To sue or not to sue? The present and future of liability actions for breaches of European Community law committed by the domestic authorities.

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A dissertation submitted to the University of Bristol in accordance with the requirements of the degree of Doctor of Philosophy in the Faculty of Law.

October 2001

Word Count : 85,515

Abstract

The introduction in the seminal case of *Francovich* of the principle of governmental liability for breaches committed by the domestic authorities added a further means of protection to the judicial arsenal of individuals claiming rights under the Treaty. At the same time, it gave rise to considerable academic comment around the legitimacy of the doctrine and the exact circumstances in which damages can be paid under it from the national treasury. The intention of this thesis is basically twofold. In the first place, it analyses the developments that have taken place in the field under consideration and attempts to assess the extent to which they have led to solutions that are both satisfactory and in accordance with the nature of the damages remedy as a judicially introduced principle lacking any explicit legal authorisation. Attention in this respect is paid to the position that the doctrine seems to hold in the system of remedies available in the national courts for the protection of the legal rights of individuals. It is further attempted to find the normative justifications that authorise the payment of damages with regard to the illegal activity of each one of the three branches of government and to figure out how the ensuing liability is allocated vertically and horizontally. The focus is finally placed on the conditions that govern the application of the doctrine and the rules that determine the institution of public liability actions and the eventual quantification and rectification of the loss suffered by the applicant. At a rather different level, the thesis also examines the impact of the *Francovich* case law on the domestic systems of public liability and the regime governing the payment of damages by the political institutions. Its ultimate objective is to ascertain whether the solutions that have been adopted so far in this area are indeed legitimised by the legal foundations that the doctrine of public liability has been based upon and to predict the way that the relevant case law may develop in the future.

To my parents and family

With love and gratitude

Acknowledgements

The author is particularly grateful to his mentor and advisor Dr. Stratos Konstadinidis (Lecturer, University of Bristol) for going far beyond his supervisory duties in order to help him bring to an end the present work. The final result would not have been the same without his invaluable assistance.

Special thanks also need to be expressed to Miss Brenda Sufrin (Reader, University of Bristol) and Mr. Paul Skidmore (Lecturer, University of Bristol) for the help and encouragement that they have so generously offered at various parts and stages of this thesis. The help of Dr. Phil Syrpis (Lecturer, University of Bristol), Professor Takis Tridimas (University of Southampton), Professor Barry Fitzpatrick (University of Ulster) and Mr. Mark Hoskins (Barrister, Brick Court) has also been deeply appreciated.

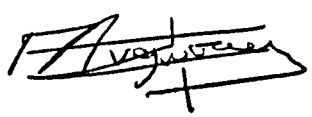
Last but not least, a word of gratitude for all those persons in the University of Bristol without the moral and financial support of which it would not have been possible to undertake and finish the present doctorate research.

Author's Declaration

I declare that the work in this dissertation was carried out in accordance with the Regulations of the University of Bristol. The work is original except where indicated by special reference in the text and no part of the dissertation has been submitted for any other degree.

Any views expressed in the dissertation are those of the author and in no way represent those of the University of Bristol.

The dissertation has not been presented to any other University for examination either in the United Kingdom or overseas.

SIGNED :  DATE : 12 October 2001

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Introduction : The road towards the establishment of the Francovich right to reparation.

0.1. The introduction of the doctrine of governmental liability under Francovich : Liability rules basically pursue the attainment of a dual objective. On the one hand, they aim at the reinstatement of financial legality and provide guarantees that those affected by a given violation will enjoy at least the financial content of their infringed individual rights. By doing so, they do not simply offer a remedy to the suffering party. They also impose a penalty on the tortfeasor. On the other hand, the prospect of damages has a strong deterrent effect on the potential wrongdoers. In the knowledge that a liability action may be brought against them, all social actors are being obliged to take into account the costs that a given activity may have for the society. By internalising these external costs, liability rules provide the incentive for the adoption of preventive measures in an attempt to minimise the risks of a certain conduct causing injury to third parties and thus giving rise to damages actions. Furthermore, the prospect of damages and the need to adopt preventive measures for their avoidance makes certain socially detrimental activities privately unprofitable. This discourages potential tortfeasors from undertaking them for the first time and from repeating them in the future.[1] The conclusion thus seems to be that liability rules serve both the financial interests of the specific individuals affected by a given violation and the general interest in deterring the undertaking and repetition of socially detrimental activities.

The Treaty provides for the obligation of the Community to make good any damage caused by its institutions and its servants in the performance of their duties.[2] This confirms that the mere possibility to seek the annulment of an unlawful measure and to establish the failure of a given political institution to act in a certain way does not always offer effective protection to the affected individuals.[3] This may be so, even when it is coupled with the provision of interim relief to the applicant.[4]

[1] On the operation of liability rules as a means of internalising the external costs of an envisaged activity, see Lee : 'In Search of a Theory of State Liability in the European Union', *Harvard Jean Monnet Working Paper* 9/99.
[2] Article 288 (2) ECT. Also see the provisions of Article 40 (1) & (2) of the European Coal and Steel Treaty.
[3] Articles 230 and 232 ECT respectively.
[4] Article 243 ECT.

This is not only because private parties have to meet stringent standing requirements, in order to bring the relevant annulment actions.[5] It is also due to the fact that the illegal activity of the defaulting institution may have already caused damage to them, the consequences of which continue to be discernible even after the final reinstatement of legality.[6]

On the contrary, nowhere in the Treaty is there any reference to the availability of a similar damages action against the domestic authorities. This probably indicates an intention to rule out any such possibility, in the absence of a specific legislative provision on the matter.[7] However, in a legal order governed by the rule of law all legal subjects are called upon to comply with the obligations that they have undertaken in its context without the recognition of privileges and immunities that are not justified on an objective basis.[8] If this is indeed so, it would be peculiar to exclude automatically the right of individuals to receive damages from the public funds for the mere reason that the breach has been committed by a national authority. It is apparent that the rationale underlying the provision of a liability action against the political institutions holds equally true also with regard to violations attributed to the State. In some cases, the payment of monetary compensation will constitute the only form of relief available to the plaintiff and the only way to guarantee that the individual concerned will enjoy at least the financial content of the benefit that a given provision intended to confer upon him. In certain others, an action for damages will be necessary to complement the substantive

[5] Non-privileged applicants can only challenge decisions in form or in substance and the failure to adopt such measures (however, see Case C-309/89, *Cordoniu SA v. Council* [1994] ECR I-1853 that seems to accept that they may contest even genuine Regulations). In order to challenge an act not addressed to them (or the omission to adopt such an act), they must prove that they are individually and directly concerned by it.

[6] Consider a Regulation that provides a subsidy to producers of product A but not to producers of the directly competitive with A product B. Even if producers of B manage to contest successfully the validity of the said measure, this will not change the fact that they will have probably suffered in the meantime damages not necessarily equated to the subsidies paid to producers of product A (by virtue of the weakening of their market position, their inability to compete on an equal basis and the eventual loss of a part of their clientele). In the above example, the losses suffered by producers of B may be of such a grave nature as to oblige them to move out of business. Also consider the example of the *Isoglucose* cases (Cases 116 & 124/77, *Amylum and Tunnel Refineries v. Council and Commission* [1979] ECR 3497, Case 143/77, *KSH v. Council and Commission* [1979] ECR 3583).

[7] See especially the observations of Germany in Cases C-46 & 48/93, *Brasserie du Pêcheur v. Germany and R. v. Secretary of State for Transport ex parte Factortame* [1996] ECR I-1029. It is interesting in this respect that in its contributions to the 1991 Intergovernmental Conference, the Commission proposed unsuccessfully the recognition of the financial liability towards individuals of countries failing to meet their Community law obligations (see the Commission Opinion of 21 October 1991 on the proposal for amendment of the Treaty establishing the European Economic Community with a view to political union. Also see *Intergovernmental Confererences : Contributions by the Commission*, EC Bull.Supp. 2/91, 151-155). Similar suggestions were also made at academic level on the occasion of the 1996 Intergovernmental Conference, again to no avail.

[8] That the Community is based on the rule of law has been established for the first time in Case 294/83, *Les Verts v. European Parliament* [1986] ECR 1339, par. 23. Also see *Opinion 1/91 (EFTA Draft Agreement)* [1991] ECR I-6079, par. 21.

protection provided for by the remedies available in the national courts and to cure the loss that the applicant has already sustained in the past.

0.1.1. The early indications on the matter : The need for the existence of some common principles for the imposition of such governmental liability had been emphasised on several occasions by the various political institutions. However, there was not any attempt to undertake specific legislative action on the matter. The European Parliament drew inspiration from its earlier *Sieglerschmidt* report[9] and referred to the need to facilitate the enforcement of damages claims against the domestic authorities. It proposed thus the standardisation of the national provisions on public liability.[10] A few years later, the Commission went on to declare the obligation of the domestic legal orders to provide for a system of liability for the payment of compensation to individuals for breaches attributed to the public administration.[11] It made it nevertheless clear that the payment of such a compensation was a matter for national law and that it was not contemplating action towards that direction.[12]

At the same time, certain judicial pronouncements in the context of the public enforcement mechanism seemed to imply that the establishment of a violation under this procedure might facilitate the affected individuals to institute liability actions at national level for the receipt of damages from the defaulting public authorities. It was declared in this direction that enforcement proceedings aim at the elimination of both the future and the past consequences of the infringements, that have been dealt with under them.[13] The Court insisted thus on pursuing the relevant enforcement action, even when the breach had already been terminated at the time that the case finally reached its judicial stage. This was so in view of the possibility of establishing the basis of a responsibility that the defendant could incur, as a result of its default towards private parties.[14] In the same line of reasoning, it

[9] Sieglerschmidt Report, Doc. 1-414/81.
[10] Resolution of the European Parliament on the responsibility of the Member States for the application of and compliance with Community law (OJ 1993, C68/32, at point 6).
[11] Answer given on behalf of the Commission by Mr Andriessen to written questions Nos 886 & 887/87 (OJ 1988, C303/2).
[12] Answer given on behalf of the Commission by Mr Delors to written question No 2423/88 (OJ 1989, C276/25 at point 2).
[13] For example, Case 70/72, *Commission v. Germany* [1973] ECR 813.
[14] Case 309/84, *Commission v. Italy* [1986] ECR 599, par. 18 and Case C-287/87, *Commission v. Greece* [1990] ECR I-125. Also see Case 39/72, *Commission v. Italy* [1973] ECR 101 and Case 240/86, *Commission v. Greece* [1988] ECR 1835.

could be argued that the payment of damages to individuals is one of the measures that a country condemned under the public enforcement mechanism is obliged to adopt in order to comply with the judgment that has recorded the violation committed by it.[15]

In a case decided in the context of the European Coal and Steal Treaty, it was declared that there exists an obligation to make reparation for any unlawful consequences that individuals may have ensued due to the adoption of inconsistent national laws and practices.[16] Reliance was made in this respect on Article 86 ECST, which is almost identically worded with the fidelity clause of Article 10 ECT. Although the litigation concerned a claim for the restitution of unduly levied sums, the general language employed therein could possibly cover also public liability actions for the payment of compensation to the intended beneficiaries of infringed legal norms.[17] With regard to the Treaty of Rome, the only direct judicial authority for the possible existence of a right to receive compensation for the illegal activity of the domestic authorities was for a long time to be found in *Russo*.[18] It was declared there that, in case of damage sustained through unlawful public activity, the State is liable to the injured party for the consequences in the context of the relevant provisions of national law on governmental liability.[19] The implication seemed to be that the matter was to be regulated in its entirety by the respective domestic arrangements.[20] If national law provided for the possibility of imposing liability for the illegal activity of a given public authority, this should be extended even to cases with a Community law component. This was not really revolutionary, but a simple application of the principle of equivalence.[21]

The question that was left unanswered was whether the obligation to pay damages could arise even in circumstances where this would not have been possible,

[15] In this direction, see the Opinion of Advocate General Mischo in Cases C-6 & 9/90, *Francovich and Bonifaci v. Italy* [1991] ECR I-5357, at point 59.
[16] Case 6/60, *Humblet v. Belgium* [1960] ECR 559.
[17] Opinion of Advocate General Tesauro in *Brasserie/Factortame III*: *op cit.* No 7, at footnote No 28.
[18] Case 60/75, *Russo v. AIMA* [1976] ECR 45.
[19] *Ibid.*, par. 9.
[20] Also see Case 101/78, *Granaria v. Hoofdproduktschap voor Akkerbouwprodukten* [1979] ECR 623, par. 14. The Court declared that "the question of compensation by a national agency for damage caused to private individuals by the agencies and servants of Member States, either by reason of an infringement of Community law or by an act or omission contrary to national law, in the application of Community law does not fall within the second paragraph of Article 215 of the Treaty and must be determined by the national courts *in accordance with the national law of the Member State concerned*" (my italics).
[21] *Infra* 0.2.1.

had the specific violation alleged by the plaintiff concerned a similar domestic law provision. A very good opportunity to clarify the matter was missed in *Enichem Base*.[22] The litigation concerned the infringement of a legal right, which was classified under Italian law as a protected interest. The problem faced by the competent national judge was that damages in the domestic legal order could only be paid at that time with regard to violations of provisions conferring subjective rights. He thus wanted to know whether this restriction violated the effectiveness requirements and whether it had to be set aside, in order to allow the applicant to receive compensation from the national treasury. The matter was referred for a preliminary ruling. It was not nevertheless finally dealt with, in the light of the answers that were provided to the rest of the questions asked by the referring judge.

However, since the days of *Simmenthal*[23] the argument had been put forward that any remedy offered for the violation of provisions intended to confer rights on individuals should concern also the period between the perpetration of the breach and its rectification by the national courts.[24] The principle of supremacy would be only partly satisfied, if the past consequences of inconsistent national laws and practices were not somehow remedied.[25] A very important development in this respect took place in the field of actions for the reimbursement of sums levied contrary to provisions meeting the direct effect requirements. It was declared there that national legislation restricting the repayment of money unlawfully collected by the domestic authorities would render the exercise of the rights of individuals virtually impossible. The national courts were thus instructed to set aside the relevant prohibitions, even if the restrictive national rules applied also with regard to similar domestic law claims.[26] This is interesting for the further reason that a restitution action presents certain similarities with a damages claim.[27] In both cases, the applicant alleges a financial detriment suffered due to the illegal activity of the

[22] Case C-380/87, *Enichem Base v. Comune di Cinisello Balsamo* [1989] ECR 2491.
[23] Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] ECR 629.
[24] Opinion of Advocate General Reischl in *Simmenthal* : *ibid.*, p. 656.
[25] A point well-argued by Advocate General Léger in Case C-5/94, *R. v. Ministry of Agriculture, Fisheries and Food ex parte Hedley Lomas* [1996] ECR I-2553, at points 68-70 of his conclusions.
[26] For example, Case 240/87, *Deville v. Administration des Impôts* [1988] ECR 3513, Case 199/82, *Amministrazione delle Finanze dello Stato v. San Giorgio* [1983] ECR 3595, Cases C-192 to 218/95, *Société Comateb v. Directeur Général des Douanes et Droits Indirects* [1997] ECR I-165.
[27] In this respect, see the Opinion of Advocate General Mischo in *Francovich* : *op cit.* No 15, at point 41 and the dissenting judgment of Oliver LJ in *Bourgoin SA v. The Ministry of Agriculture, Fisheries and Food* [1986] 1 CMLR 267, at point 69.

domestic authorities. The wrongdoer is called upon to make good by financial means the violation committed by it. The end result is that the plaintiff is reinstated in the financial position that he would have been in, had the specific infringement complained of not taken place.

0.1.2. The decision in Francovich : In the seminal case of *Francovich*[28], it was finally established that Community law requires indeed the payment of damages to individuals in case of violation of its provisions by the national authorities. The applicants were employees, that had been made redundant as a result of the insolvency of their employers. They claimed that they were covered by the protective scope of Directive 80/987, which provided that any unpaid wages would be guaranteed by institutions established for this purpose.[29] The problem was that Italy had failed to implement this measure and that it had not thus specified the bodies, against which its beneficiaries could claim the payment of the relevant guarantee. The plaintiffs brought an action in their national courts, claiming that the provisions of the unimplemented measure were sufficiently clear and precise as to impose upon the defaulting country the obligation to pay itself the guarantee that they were entitled to. In the alternative, they considered that the defendant should be ordered to make good any damages that they had suffered due to its omission to proceed to the adoption of the required implementing legislation.

When the Court was called upon to rule on these issues, it found that the provisions of the measure were not sufficiently clear and precise as to the debtor of the guarantee. They did not thus confer upon the applicants the right to rely directly upon them against the defendant.[30] It then went on to examine the alternative liability claim. It started by recalling the original character of the legal system established by the Treaty. It repeated that the law which emanates from this new legal order does not apply at a purely intergovernmental level. It also confers rights upon individuals, the protection of which has been entrusted to the various national

[28] *Francovich* : *ibid.*
[29] Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of the employer (OJ 1980, L283/23).
[30] *Francovich* : *op cit.* No 15, par. 10-27, especially par. 23-27. Also see the Opinion of Advocate General Mischo, who considered that the content of the guarantee was lacking the clarity and precision required to give rise to direct effect (at points 7-31 of his conclusions).

courts.[31] It considered that the principle of effectiveness would be impaired and that the effective judicial protection of individuals would be weakened, if the national courts were not in a position to order the payment of damages from the public funds in case of violations committed by the domestic authorities.[32] It further referred to the fidelity clause of Article 10 ECT, which imposes upon the national legal orders the obligation to take all measures required to nullify the consequences emanating from the infringement of the principle of legality.[33] It thus concluded that it is inherent in the system of the Treaty to make good from the national treasury the loss caused to individuals by breaches attributed to the domestic authorities.[34]

What is striking about *Francovich* is that its introduction seems to be considered as nothing more than the logical conclusion of a case law, that had already emerged with regard to the judicial enforcement of the legal rights of individuals. This is particularly apparent from the fact that the doctrine is established on the principles of effectiveness and effective judicial protection. These were developed, in order to curtail the discretion of the domestic legal orders to determine the remedies and procedures that would be made available at national level for the protection of the legal position of private parties. It is thus appropriate to proceed at this point to the examination of the different stages that these principles have gone through, in order to ascertain the extent to which they could provide indeed the basis for the existence of the *Francovich* right to reparation.

0.2. From the principle of national procedural autonomy to the right to receive effective judicial protection : Any legal order must offer effective means for the respect of the rights and obligations that it provides for its various legal subjects. It is not otherwise possible to attain any of the objectives that it pursues, in the absence of an effective system of sanctions and remedies. This system should be capable of dissuading any potential wrongdoer from infringing the duties, that the law intended to impose upon him. It must also offer adequate remedial protection and relief to anybody affected from a given illegal activity. It is nevertheless true that the Treaty

[31] *Ibid.*, par. 31-32.
[32] *Ibid.*, par. 33.
[33] *Ibid.*, par. 36.
[34] *Ibid.*, par. 35 and 37.

suffers from an inherent inability to guarantee the existence of a system meeting the above characteristics. It merely offers to individuals the possibility to receive a certain degree of protection against violations committed by the political institutions.[35] It hardly contains, on the contrary, any references with regard to breaches attributed to the domestic authorities and to private parties. It only provides for the public enforcement mechanism, which does not suffice of itself to guarantee the full respect of the legal rights of individuals and to provide effective remedies in case of their violation.[36]

This highly centralised procedure operates without the formal involvement of private litigants at any of its stages. It also entrusts the endless task of monitoring and enforcing the proper application of the law to the limited resources of two institutions. As a result, only a very limited number of cases can be dealt with under it. Furthermore, any decisions delivered in its context are merely declaratory. The only judicial means available for the exercise of some kind of pressure on the recalcitrant country to comply with them is through the imposition upon it of a periodic monetary penalty, following the institution of a new round of legal proceedings. Even if the violation is finally terminated, the benefit for individuals will only be for the future. This is because the judgments given under this enforcement mechanism do not cure of themselves any detriment that may have already been sustained in the past.

This apparent legislative gap made it necessary to involve individuals and their domestic courts in the judicial application and enforcement of the law. Private parties were thus given the right to bring proceedings at national level by relying directly on legal norms meeting certain minimum requirements of clarity, precision and unconditionality.[37] This right was coupled by the subsequent introduction of the principle of supremacy, which required the immediate setting aside of any national law and practice that contravened such directly effective provisions.[38] The national

[35] The provisions for the judicial review of Community acts and failures to act (Articles 230-233 and 241 ECT) and the principle of contractual and non-contractual liability for breaches committed by the Community institutions (Article 288 ECT).
[36] Articles 226-228 ECT.
[37] Introduced for the first time in Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1 and extended progressively to all legally binding Community law provisions.
[38] *Simmenthal* : *op cit.* No 23.

courts were also placed under the obligation to do whatever possible in order to interpret their domestic legislation in the light of the wording and purpose of any relevant Community measure, so as to attain the objective pursued by the latter.[39] The enforcement of the legal rights of individuals was thus entrusted primarily to the vigilance of their intended beneficiaries.

Both doctrines of direct effect and consistent interpretation operate at the same level, aiming at enabling individuals to enjoy the specific right that a given legal norm intended to confer upon them. However, the mere fact that the law may be invoked in the national courts does not mean that the consequences that its violation may entail for the applicant will be cured automatically. Both principles prescribe a course of action rather than a concrete remedy. Showing that an infringement has taken place and being entitled to the provision of judicial protection, certainly implies the right to receive some kind of redress. The fact nevertheless remains that the sole application of the doctrines of direct effect and consistent interpretation does not specify the form and content of the remedy, that should be made available in the context of a given scenario. The problem remains, even when the infringed norm makes a general reference to the obligation of the national legal orders to impose sanctions in case of violation of its substantive provisions. Even in such circumstances, it is for national law to determine the appropriate remedy.[40] It is only when the sanction that should be imposed is clearly specified in the measure itself that there can be no doubt about the form that the judicial protection offered to individuals should actually take.[41]

The early case law on the matter appeared to limit to the absolute minimum any intervention in the field under consideration. This was the conclusion drawn from the judicial pronouncements made in the two *Rewe* cases. It was declared in

[39] Introduced in Case 14/83, *Von Colson and Kamann v. Land Nordrhein-Westfalen* [1984] ECR 1891 and further developed in Case C-106/89, *Marleasing SA v. La Commercial Internacional de Alimentacion SA* [1990] ECR I-4135.

[40] For example, Article 6 of Council Directive 76/207/EEC (OJ 1976, L39/40) leaves to the national legal orders the discretion as to the choice of the remedies that will be made available for the violation of the principle of sex equality. This is made under the condition that any solution adopted must offer an adequate and effective protection and must have a deterrent effect on the wrongdoer (*Von Colson* : *ibid.*, par. 23).

[41] For example, Council Directive 89/665/EEC of 21 December 1989 on the co-ordination of laws, regulations and administrative provisions relating to the award of public supply and the public work contracts (OJ 1989, L395/33) and Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative procedures relating to the application of Community rules on the procurement procedures of entities operating in the water, transport and telecommunications sectors (OJ 1992, L76/14). These provide for the payment of damages in case of injury sustained as a result of the application by the domestic authorities of unlawful contract award procedures.

the first place that it is for the national legal orders to designate the competent courts and to determine the procedural conditions, that will govern the legal actions brought for the judicial protection of the directly effective rights of individuals.[42] It was further clarified that it was not actually intended to create new remedies in the national courts other than those already provided for by the domestic legislation, in order to ensure the protection of those individual rights.[43] The term national procedural autonomy was used to describe the wide discretion that seemed to be granted to the domestic legal orders over the totality of the procedural and remedial issues having to do with the protection of the infringed legal rights of individuals.

0.2.1. The introduction of the effectiveness principle and the obligation of the courts to modify the national procedural and remedial rules : However, the principle of national procedural autonomy does not mean that there is no right of control over the solutions that the domestic legal orders introduce in the procedural and remedial field. To start with, the national rules apply only in the absence of harmonisation on the matter.[44] This should be interpreted as implying the intention to proceed to such a step in the future with regard to the applicable procedural and remedial rules. Any reliance made on national law must be thus seen as a temporary phenomenon, that will give its place progressively to uniform standards. In fact, such a harmonisation has already taken place in certain limited areas. A very good example in this direction is given by the Directives on the award of public supply and public work contracts.[45] These provide for the payment of damages by the domestic authorities, if the injury caused by the unlawfulness of contract award procedures cannot be remedied through the reinstatement of substantive legality. This requirement introduces innovative remedial solutions in those domestic legal orders, that do not accept the payment of monetary compensation for similar breaches of an internal nature. The extent of this innovation is such, as to entail in practice a true cultural and political revolution for certain national jurisdictions.

[42] Case 33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland (Rewe I)* [1976] ECR 1989, p. 1997. Also see Case 45/76, *Comet BV v. Produktschap voor Siergewassen* [1976] ECR 2043.
[43] Case 158/80, *Rewe-Handelgesellschaft Nord mbH v. Hauptzollampt Kiel (Rewe II)* [1981] ECR 1805, par. 44.
[44] *Rewe I* : *op cit.* No 42, p. 1997.
[45] Directives 89/665/EEC and 92/13/EEC : *op cit.* No 41.

Even more importantly, the case law had hinted right from the beginning its intention to exercise what seemed at that time as a minimum measure of control over the protection offered by the national courts to the legal rights of individuals. It made thus the operation of the principle of national procedural autonomy subject to the respect of the principles of equivalence and practical possibility.[46] Those claiming rights under directly effective provisions should not be treated less favourably than those bringing similar actions on the basis of national law. The protection offered to them should not further be such, as to make it impossible in practice to exercise the rights enshrined in the legal norms that they purported to rely upon. The principle of practical possibility transformed progressively into the principle of effectiveness, prohibiting any national rule that made the exercise of the rights of individuals virtually impossible or excessively difficult.[47] The national courts were now obliged to offer direct and immediate[48], real and effective[49] protection and to impose upon the wrongdoer sanctions with a deterrent effect.[50] The case law was not specifying the remedy that national law should offer in any given circumstances. It made it nevertheless clear that, whatever the choice made in this respect might possibly be, the protection available to the applicant should be such as to live up to the standards of effectiveness.

This approach is very apparent in the second *Marshall* case.[51] The litigation concerned Article 6 of Directive 76/207. This provision imposes upon the national legal orders the obligation to take all necessary measures to ensure that persons who consider themselves wronged on grounds of their sex with regard to the application of the principle of equal treatment will have recourse to judicial and administrative remedies.[52] It was recalled that this leaves to national law the choice as to the measures that should be adopted, in order to give effect to the equal treatment requirements.[53] It was nevertheless added that the protection offered should in any case be real and effective, so as to have a strong dissuasive effect on the

[46] *Rewe I*: *op cit.* No 42, p. 1997.
[47] Case 130/79, *Express Dairy Foods Ltd. v. Intervention Board for Agricultural Produce* [1980] ECR 1887.
[48] Case 13/68, *Salgoil SpA v. Italian Minister of Foreign Trade* [1968] ECR 453.
[49] *Von Colson* : *op cit.* No 39, par. 23.
[50] *Ibid.*, par. 28.
[51] Case C-271/91, *Marshall v. Southampton and South West Area Health Authority (Marshall II)* [1993] ECR I-4367.
[52] Council Directive 76/207/EEC : *op cit.* No 40.
[53] *Marshall II* : *op cit.* No 51, par. 23.

wrongdoer.[54] When national law has provided for the payment of financial compensation, this must be adequate so as to ensure that the loss sustained by the applicant is made good in full.[55] As a result, national rules setting an upper limit on the amount of damages that the courts may possibly order and prohibiting the payment of interest to the plaintiff should be set aside with regard to cases involving a Community law component.[56] It was now apparent that the case law was requiring the modification of national rules failing the effectiveness test.[57] It did not matter in this respect that the same restrictions applied also with regard to similar domestic law claims.

0.2.2. The obligation of the courts to apply existing remedies under novel circumstances and the introduction of the principle of effective judicial protection : From the moment that the Court had decided to tighten its control on the content of the remedies provided for by the domestic legal orders, it was obvious that the choice as to the necessity to offer protection in a given case would not be left intact either. Respect for the effectiveness principle may indeed require sometimes the provision of redress that would not have been available, had the claim concerned a similar domestic law right. Such an issue arose in the field of interim protection. In *Factortame*[58], the House of Lords wished to know whether the national courts were empowered or even obliged to provide interim relief with regard to the application of domestic statutes that allegedly violated the relevant provisions on freedom of establishment. The importance of the question consisted in the fact that such a possibility did not exist at that time under its case law. The provision of interim relief against statutory legislation would go especially against the common law principle that a normative act is considered to be legal, until such time as its unlawfulness has been established judicially. The reference was thus

[54] *Ibid.*, par. 24.
[55] *Ibid.*, par. 26.
[56] *Ibid.*, par. 30-31.
[57] Also see in this respect *San Giorgio* : *op cit.* No 26. It was ruled that restrictive conditions on the repayment of sums levied in breach of directly effective provisions should be set aside, even if they applied also with respect to sums levied contrary to national law. In the same direction, Case C-377/89, *Cotter and Mc Demmott v. Minister for Social Welfare and Attorney General* [1991] ECR I-1155. The national principle of unjust enrichment could not prevent individuals from receiving redress in case of prohibited sex discrimination.
[58] Case C-213/89, *R. v. Secretary of State for Transport, ex parte Factortame Ltd and others* [1990] ECR I-2433.

politically sensitive. Notwithstanding this fact, the answer given to it was unequivocal. When a court considers that the sole obstacle that prevents it from granting interim protection in cases involving alleged violations of directly effective provisions is a rule of national law prohibiting such a possibility, it is obliged to set aside the applicable prohibition.[59] The opposite would impair the effectiveness requirements and the principle of supremacy.

It has now been clarified that the obligation of the national courts to order interim protection may exist, even when the illegality complained of by the applicant does not have its primary source in national law as such but rather in a measure adopted by the political institutions. Following thus the decisions in *Zuckerfabrik*[60] and *Atlanta*[61], national courts are obliged in some circumstances to suspend temporarily the application of domestic legislation based on allegedly unlawful Community measures. They may also be required to grant even positive interim relief, when this is considered as necessary for the effective judicial protection of the plaintiff. It does not matter in this respect whether they have the jurisdiction to do so under national law with regard to similar domestic claims. This amounts to individuals often receiving a more favourable judicial treatment than they would have possibly had, if their claim was based on purely domestic grounds.

In the light of these developments, it needs to be asked what has happened to the early declarations that it was not actually intended to introduce remedies not already provided for by national law for the protection of individuals. One possible interpretation of the relevant judicial pronouncements would be to argue that the Court has overruled its previous position and that it now recognises to itself some kind of an implicit power to introduce legal means unknown to the domestic legal orders. There is nevertheless an alternative explanation, that has the virtue of inserting some more logic in the developments that have taken place in this area. It can be thus argued that the case law considers as new only remedies which are absolutely unknown in a given national legal system. It may hence require the mere extension of already existing national legal means so as to render their application

[59] *Ibid.*, par. 21.
[60] Cases C-143/88 & 92/89, *Zuckerfabrik Süderdithmarschen AG v. Hauptzollampt Itzehoe* [1991] ECR I-415.
[61] Case C-465/93, *Atlanta v. Bundesampt für Ernährung und Forstwirtschaft* [1995] ECR I-3761.

available, even where this would not have been possible with regard to similar domestic law claims.

Under this construction, *Factortame* simply required the referring court to apply under novel circumstances a remedy that already existed in the national legal system. It did not oblige it to create a course of action that would not be available, even if the request did not concern the temporary setting aside of a domestic statute. Suffice it to note at this point that the judgment was given clearly on the assumption that the national judge would have granted the requested interim relief, had it not been for the specific rule prohibiting such a possibility with regard to acts of the Parliament.[62] When the principle of effectiveness requires it, the courts are thus obliged to make available to individuals domestic remedies that would not have been accessible to them for a given type of national law violation. In fact, this had been implied in *Rewe II* itself. It was declared there that it must be possible for every type of action provided for by national law to be available for the purpose of ensuring the observance of directly effective provisions.[63] A possible interpretation of this statement is that, once a course of action exists in a domestic legal order, any immunity against it conferred by national law can be possibly challenged under the standards of effectiveness.[64]

The importance that is currently placed on the protection of the legal rights of individuals is further testified by the fairly recent appearance of the principle of effective judicial protection, as a corollary to the principle of effectiveness.[65] This principle was originally introduced with regard to the right to receive redress against violations of the requirement of equal treatment on grounds of sex.[66] It has been extended since even to areas, where it cannot be found expressly codified in the provisions of a given legal measure.[67] The exact relationship between the principles of effectiveness and effective judicial protection has not been clarified yet by the

[62] *Factortame* : *op cit.* No 58, par. 21.
[63] *Rewe II* : *op cit.* No 43, par. 44.
[64] In this respect, see the Opinion of Advocate General Mischo in *Francovich* : *op cit.* No 15, at point 47.
[65] On the meaning of the principle of effective judicial protection, see Prechal : *Directives in EC Law : A Study on EC Directives and their Enforcement by National Courts*, OUP 1995, pp. 158-162.
[66] Case 222/84, *Johnston v. Chief Constable of the RUC* [1986] ECR 1651.
[67] Case 222/86, *UNECTEF v. Heylens* [1987] ECR 4097, Case C-104/91, *Colegio Oficial de Agentes de la Propiedad Immobiliaria v. Aguirre Borrell and others* [1992] ECR I-3003 and Case C-97/91, *Oleificio Borrelli v. Commission* [1992] ECR I-6313.

case law. It does nevertheless appear that they operate in a complementary and sometimes competitive function, aiming respectively at the enhancement of the general objectives pursued by the law and the effective protection of the legal rights that the latter intends to confer upon individuals.

0.3. Concluding remarks : In the light of the above, the introduction of *Francovich* on the basis of the principles of effectiveness and effective judicial protection seems to entail two major consequences. The first one is that it can only be justified, if the imposition of liability for the illegal activity of the domestic authorities is not a totally unknown phenomenon in the domestic legal orders that will be called upon to apply the doctrine. Otherwise, it will constitute a completely new remedy in the sense of the *Rewe II* prohibition. It does not nevertheless matter in this respect that national law may provide for immunities with regard to certain public authorities. It suffices that a point of departure exists in all domestic legal systems, so as to consider that at least the principle of public liability is accepted by the totality of them. Provided that this is indeed so, the national courts will be empowered to order damages even in circumstances where this would not have been possible for similar domestic law breaches.

On the other hand, the conditions for the operation of *Francovich* should continue to be governed primarily by national law. Any exceptions to this rule can be accepted only to the extent that the applicable national standards restrict excessively the chances of individuals to receive effective protection under a public liability suit. This is because the principle of effectiveness that the doctrine is based upon can only authorise the setting aside of conditions that fail to meet its requirements. When the applicable national rules exceed the minimum standard of protection set by *Francovich*, they should continue thus to govern the relevant claims of the affected individuals. This should be so, even if it leads to diversities in the judicial treatment of similar breaches from the one legal order to the other.

It is thus necessary to determine the extent to which *Francovich* has been indeed introduced and developed in accordance with the above requirements. However, the examination of the issues relating to the exact scope and the

conditions for the application of the doctrine should be preceded by the determination of the position that the latter holds in the system of remedies available in the national courts for the protection of individuals against violations committed by the domestic authorities. There are two basic issues that need to be dealt with in this respect. It needs thus to be ascertained whether the availability of *Francovich* is affected by the existence or absence of the direct effect requirements. It is also asked whether national law may impose upon individuals the obligation to exhaust all alternative national remedies, before they can finally proceed with their governmental liability action.

Chapter One : State liability and alternative courses of action : How independent can an autonomous remedy be ?[1]

1.1. Introduction : It will be recalled that *Francovich* was originally introduced in a case involving the failure to implement a non-directly effective measure. Subsequent case law has clarified that the imposition of governmental liability is possible with regard to any total[2] or partial[3] failure to adopt national implementing measures and the violation of substantive provisions of both the primary[4] and the secondary Community legislation.[5] As a result, the payment of damages under the doctrine can be sought for any kind of breach concerning a legally binding duty. Introduced as a principle inherent in the system of the Treaty[6] and based on the twin principles of effectiveness and effective judicial protection[7], *Francovich* constitutes the third in chronological order method employed for the judicial enforcement of the law. Contrary to the previously explored principles of direct effect and consistent interpretation, it operates at the level of remedies and aims primarily at the reinstatement of financial rather than substantive legality. The successful reliance upon it does not allow the applicant to enjoy the actual right, that the infringed provision intended to confer upon him. It rather restores its disturbed financial content, at least to the extent that the latter can be quantified with sufficient precision in monetary terms.

An important issue that has not been dealt with so far in a satisfactory way by the case law concerns the relationship of *Francovich* with the direct effect requirements and the alternative remedies that may be available in the national

[1] Based on a Paper presented in the 5th EU/International Law Forum, The Future of Remedies in Europe, Bristol, 13-14 May 1999.
[2] Cases C-6 & 9/90, *Francovich and Bonifaci v. Italy* [1991] ECR I-5357, Cases C-178, 179 and 188 to 190/94, *Dillenkofer and others v. Germany* [1996] ECR I-4845.
[3] Such misimplementation breaches were thus involved in Case C-392/93, *R v. HM Treasury ex parte BT* [1996] ECR I-1631, Cases C-283, 291 & 292/94, *Denkavit Internationaal v. Bundesampt für Finanzen* [1996] ECR I-5063, Case C-140/97, *Rechberger and others v. Austria* [1999] ECR I-3499, Case C-150/99, *Stockholm Lindöpark AB v. Swedish State* [2001] ECR I-493.
[4] Cases C-46 & 48/93, *Brasserie du Pêcheur v. Germany and R. v. Secretary of State for Transport ex parte Factortame* [1996] ECR I-1029, Case C-5/94, *R. v. Ministry of Agriculture, Fisheries and Food ex parte Hedley Lomas* [1996] ECR I-2553, Case C-302/97, *Konle v. Republic of Austria* [1999] ECR I-3099.
[5] Case C-319/96, *Brinkmann Tabakfabriken GmbH v. Skatteministeriet* [1998] ECR I-5255, Case C-127/95, *Norbrook Laboratories Ltd. v. Ministry of Agriculture, Fisheries and Food* [1998] ECR I-1531, Case C-118/00, *Larsy v. Institut National d'assurances sociales pour travailleurs indépendants* [2001] ECR I-5063.
[6] *Francovich* : *op cit.* No 2, par. 35.
[7] *Ibid.*, par. 33.

courts to the victim of the allegedly unlawful conduct of the domestic authorities. It needs thus to be ascertained whether damages can ever be paid with regard to infringements of provisions, that do not have the required clarity and precision to be held directly effective. The question is basically whether it is possible to establish in such circumstances the existence of identifiable legal rights, the violation of which could give rise to a liability action. It is further asked whether the doctrine of governmental liability constitutes a residual remedy, only available in the absolute or partial absence of effective national remedies. What needs to be established in this respect is whether *Francovich* introduces a principle of wide application, the availability of which is guaranteed regardless of the existence of alternative means of protection open to the plaintiff. This raises the controversial issue of whether an objection of parallel proceedings may be put forward against an individual, that purports to bring a public liability suit without having previously exhausted the other courses of action that may be available to him in the national courts.

1.2. The operation of Francovich in the absence of the direct effect requirements : The question asked at this point is whether the imposition of governmental liability is possible, even with regard to provisions that cannot be relied upon directly in the national courts. At first sight, it seems that the matter has already received an unequivocal answer. In *Francovich* itself it was declared that the possibility of obtaining redress under a public liability action is particularly indispensable, when individuals are unable to enforce before the national courts the rights that a given legal norm intended to confer upon them.[8] There is little doubt that this statement was made, not only because the case involved the failure to adopt the national implementing legislation required to give effect to the provisions of Directive 80/987[9], but also in view of the previous finding that this unimplemented measure did not meet the required conditions to be enforced directly by the plaintiffs in the national courts.[10]

[8] *Ibid.*, par. 34.
[9] Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of the employer (OJ 1980, L283/23).
[10] *Francovich* : *op cit.* No 2, par. 10-27.

Indeed, the absence of direct effect does not mean necessarily that the provision concerned did not intend to confer rights upon individuals and to impose respective obligations on private parties and the public authorities.[11] It merely shows that the law is either not sufficiently clear and precise to be applied in a uniform way by the national courts or that it cannot be invoked directly against a given defendant. In the latter case, one can possibly talk about the absence of a technical direct effect relating not to the quality of a given legal norm but rather to the status of the person against which the measure needs to be relied upon. In the absence of direct effect, individuals are not entitled to invoke the actual right that a certain provision intended to confer upon them and to require the automatic setting aside of any inconsistent national legislation. This does not nevertheless imply that the intended beneficiaries of non-directly effective measures should remain totally unprotected. The introduction of *Francovich* on the basis of the twin principles of effectiveness and effective judicial protection confirms that this is indeed the case. The need to respect these principles holds good with regard to all legally binding provisions, regardless of the existence or absence of direct effect. In the absence of alternative substantive protection in the national courts, the desired effect of the infringed legal norm is satisfied at least partly by granting to the suffering individuals the chance to receive compensation approximately equivalent to the financial content of the benefit that the law intended to confer upon them.

However, this does not mean that the absence of direct effect will never be an obstacle to the success of the relevant liability action. The question that needs to be addressed in this context concerns the possible existence of a connection between the requirement under *Francovich* that the provision infringed should be intended to confer sufficiently identifiable individual rights[12] and the conditions of the direct effect doctrine. It is specifically wondered whether the clarity and precision that a given provision should have in order to give rise to identifiable individual rights is in fact the same as the one required under the direct effect principle. What is asked in final analysis is whether it is indeed possible to impose liability for the violation

[11] In this respect, Prechal : *Directives in EC Law : A Study on EC Directives and their Enforcement by National Courts*, OUP 1995, pp. 124-129.
[12] *Francovich* : *op cit.* No 2, par. 40, *Brasserie/Factortame III* : *op cit.* No 4, par. 51. Also, see *infra* 3.3.2.

of legal norms that do not meet the direct effect requirements and which may not consequently be relied upon by their beneficiaries in the national courts.

1.2.1. The direct effect criteria and the creation of individual rights test : The existence of direct effect presupposes that the provision concerned is clear, precise and unconditional as to its content and the identity of both its intended beneficiaries and the debtors of the substantive rights enshrined in it.[13] The absence of clarity as to any of these factors may preclude the application of the doctrine. That was the case in *Francovich* itself. The unimplemented measure that constituted the basis of the relevant action was not sufficiently clear and precise as to the identity of the bodies liable for the payment of the guarantee, that it intended to confer upon the applicants.[14] Its provisions could not thus be relied upon directly. There are also instances when resort to the direct effect principle is not possible, even if all the relevant conditions are met. This is so when its reliance is attempted against a private party, in circumstances where such a horizontal enforcement is barred in the absence of implementing legislation. This is the case with regard to Directives.[15]

An individual right is identifiable for the purposes of *Francovich*, when it is possible to quantify its content with sufficient precision in monetary terms and to determine with certainty the identity of its holders.[16] Apart from that, the only crucial issue is to establish that the source of the damage alleged by the plaintiff is indeed the action or inaction of a public authority. It may even be necessary to identify the specific body responsible for the breach, if national law requires the determination of the primary wrongdoer and the initiation of the relevant liability action directly against it. These are basically causal link issues, the determination of which has been left primarily to the domestic legal orders.[17] Once this causality has been established, it does no longer matter the identity of the legal subject that the plaintiff would have been entitled to claim a certain benefit from in the absence of the infringement committed by the domestic authorities. This explains why the

[13] *Francovich* : *ibid.*, par. 10 *et seq.*
[14] *Ibid.*, par. 23 *et seq.*
[15] Case 152/84, *Marshall v. Southampton and South-West Hampshire Area Health Authority* (Teaching) [1986] ECR 723.
[16] *Infra* 3.3.2.2.
[17] *Brasserie/Factortame III* : *op cit.* No 4, par. 65.

uncertainty in *Francovich* as to the debtors of the guarantee owed to the applicants did not affect the right of the latter to claim damages for the omission to adopt in time the necessary implementing legislation. With regard further to breaches consisting in the total or partial failure to adopt national implementing legislation, the availability of a *Francovich* action is not precluded by the fact that the measure concerned intended to impose obligations on private parties rather than the public authorities. Indeed, the defendant is sued for the infringement of its implementation duties and not as the debtor of the guarantee contained in the substantive provisions of a given legal norm.

However, this does not answer whether identifiable individual rights can ever arise from provisions the content and intended beneficiaries of which are not determined in a sufficient clarity and precision as to allow the direct reliance upon them before the national courts. In *Francovich* itself, the provisions of the measure that constituted the basis of the relevant liability action were directly effective as to the content of the guarantee enshrined therein[18] and the identity of the persons entitled thereto.[19] The direct effect action failed merely on the basis of the impossibility to identify the debtors of the right, that they intended to confer upon their beneficiaries.[20] A similar situation arose in *Carbonari*[21], with regard to Directive 75/363.[22] Despite the fact that Italy had not adopted the necessary implementing legislation, it was concluded that the provisions of the measure were unconditional and sufficiently precise in so far as they conferred upon trainee specialists the right to appropriate remuneration during their full-time training period.[23] This right could not be relied upon directly in the national courts, due to the fact that it was not possible to determine the body liable to make the required payment and the level of the appropriate remuneration.[24] The applicants were nevertheless reminded that they could bring an action on the basis of *Francovich*.[25]

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[18] *Francovich* : *op cit.* No 2, par. 22.
[19] *Ibid.*, par. 14.
[20] *Ibid.*, par. 25-26.
[21] Case C-131/97, *Carbonari and others v. Università degli Studi di Bologna, Ministero della Sanità, Ministero dell'Università e della Ricerca Scientifica, Ministero del Tesoro* [1999] ECR I-1103.
[22] Council Directive 75/363/EEC of 16 June 1975 concerning the coordination of provisions laid down by law, regulation or administrative action in respect of activity of doctors (OJ 1975, L167/14).
[23] *Carbonari* : *op cit.* No 21, par. 44.
[24] *Ibid.*, par. 45-47.
[25] *Ibid.*, par. 52.

1.2.2. Putting the pieces together : It is thus apparent that a certain degree of clarity and precision as concerns the subject-matter of the infringed provision and the identity of the intended beneficiaries thereof is always required for the imposition of governmental liability. The question is whether this degree is the same as the one required for the operation of the direct effect principle. If this is indeed the case, the only difference between the two doctrines will be that the payment of damages for the illegal activity of the national authorities will not be obstructed by the absence of the technical direct effect and the uncertainty surrounding the determination of the addressees of a given substantive legal obligation. It could be thus argued that the reference in *Francovich* to provisions intending to confer sufficiently identifiable individual rights has in substance the meaning that public liability can only arise with regard to obligations, the content of which satisfies the requirements of direct effect.

It cannot be nevertheless accepted that any directly effective provision intends automatically to confer individual rights. Indeed, it has been established that the creation of such rights is not a precondition of direct effect. Individuals may rely directly on unconditional and sufficiently clear and precise provisions, regardless of whether these confer rights upon them or simply impose obligations on third parties.[26] This is better known as the objective direct effect. It suffices for its existence that a clear and precise obligation is imposed on the public authorities or a private party. However, certain national courts continue to require from the applicants in a direct effect action to show that they were actually intended to receive some kind of an identifiable benefit from the provisions that they attempt to rely upon.[27] A similar tendency can be discerned also at doctrinal level. It is thus often considered in this respect that individual rights for the purposes of *Francovich* are always created as a logical and inescapable consequence of the existence of direct effect.[28]

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[26] Especially Case C-431/92, *Commission v. Germany* (*GrossKrotzenburg* case) [1995] ECR I-2189.

[27] This tendency is very apparent in the jurisprudence of the German courts, especially with regard to cases involving environmental directives. For more on this point, see Ruffert : 'Rights and Remedies in EC Law : A Comparative View' (1997) 34 *CMLRev* 307.

[28] Opinion of Advocate General Tesauro in *Brasserie/Factortame III* : *op cit.* No 4, at point 56. Also see Vandersanden : 'Le Droit Communautaire', in Vandersanden/Dony (eds.) : *La Responsabilité des Etats Membres en cas de Violation du Droit Communautaire*, Bruylant 1997, pp. 5-61, at p. 30.

The correct approach would probably be to accept that directly effective provisions have definitely a sufficiently identifiable content but that they do not give rise to a *Francovich* action, unless they also intend to confer individual rights. The existence of such an intention should not be taken for granted. For example, consider a measure that aims exclusively at the reduction of environmental pollution and which is drafted in a way as to impose clear and precise obligations on the public authorities without conferring identifiable individual rights. This could be found to be directly effective on the basis of the objective direct effect, but its violation would not give rise to a *Francovich* action. This constitutes a further proof that the creation of the identifiable individual rights requirement set by *Francovich* resembles the direct effect test but cannot be nevertheless identified with it.

1.3. Francovich as a remedy complementing the protection offered by the other available judicial means : The broad language used in *Francovich* already seemed to suggest that the possibility to receive compensation under the doctrine would not be ruled out automatically, just because other courses of action might be open to the victim of an allegedly illegal activity. Financial reinstatement may be indispensable, even when it does not constitute the only means of protection available to the applicant. That this is indeed so has been confirmed by *Brasserie/Factortame III*.[29] Liability proceedings had been brought for the violation of the directly effective provisions on free movement of goods and freedom of establishment. Some of the intervening governments argued that the introduction of *Francovich* intended to fill in a lacuna in the system for safeguarding the rights of individuals. They thus contended that damages could only be paid with regard to infringements of provisions, that did not meet the direct effect requirements.[30] The Court rejected their argument. Referring to its case law under the public enforcement mechanism[31], it recalled that direct effect constitutes a minimum guarantee which is not sufficient in itself to ensure the full application and respect of the law.[32] It then emphasised

[29] *Brasserie/Factortame III* : *ibid.*
[30] *Ibid.*, par. 18.
[31] For example, Case 168/85, *Commission v. Italy* [1991] ECR 2945, par. 11 and Case C-119/89, *Commission v. Spain* [1991] ECR I-641, par. 9.
[32] *Brasserie/Factortame III* : *op cit.* No 4, par. 20.

that even the violation of directly effective provisions can cause damage to individuals.[33] It concluded that the right to reparation is the necessary corollary of the direct effect of the provision, the breach of which has allegedly given rise to the damage complained of by the applicant.[34]

This did not nevertheless clarify whether *Francovich* was envisaged as a remedy complementary to or concurrent with the other legal means available in the national courts. Given that the doctrine has been established on the basis of the twin principles of effectiveness and effective judicial protection, there should be little doubt that its availability is guaranteed in any case where it contributes to the reduction of the gaps possibly existing in the system of protection offered by national law to the infringed legal rights of individuals. This is so, both when it makes up for the complete absence of effective national remedies and when it simply complements the measure of protection offered by the other available judicial means. Even the reinstatement of the disturbed substantive legality does not exclude the possibility that individuals might have suffered in the meantime some kind of financial damage. Indeed, it is often impossible to confer retroactively upon them the actual right that they were supposed to enjoy and the effluxion of time reduces inevitably the value of a belatedly conferred benefit. A liability action may be thus necessary to claim profits that have already been lost during the period that the domestic authorities have been violating the public duties entrusted to them.[35] It may also be directed towards the payment of interest, as a means of reinstating a belatedly conferred benefit to its original financial value.[36] Substantive and financial protection should be seen as the two sides of the same coin. The one does not exclude the other, to the extent that they operate in a complementary fashion.[37]

This is also the conclusion to be drawn from the relevant case law. The payment of damages as a complementary remedy has been accepted under various circumstances. In *Brasserie/Factortame III* and *Hedley Lomas*, the direct effect of

[33] *Ibid.*
[34] *Ibid.*, par. 22.
[35] This was the case in *Brasserie/Factortame III.*
[36] In this respect, see Case C-66/95, *The Queen v. Secretary of State for Social Security ex parte Eunice Sutton* [1997] ECR I-2163 and Cases C-397 & 410/98, *Metallgesellschaft Ltd. and others v. The Commissioners of Inland Revenue and HM Attorney General* [2001] ECR I-1727.
[37] Opinion of Advocate General Tesauro in *Brasserie/Factortame II* : *op cit.* No 4, at points 31-34.

the legal norms involved in those litigations could not cure the loss that the applicants had already suffered due to the fact that the illegal activity of the domestic authorities had prevented them temporarily from enjoying the benefits that those provisions intended to confer upon them. The availability of a liability claim served thus to make up for the inability to reinstate for the past the substantive content of those benefits.[38] Recourse to *Francovich* has also been made as a means of providing compensation for any loss that even the retroactive application of the law cannot possibly remedy. In *Bonifaci*[39] and *Maso*[40], the availability of a liability action was thus required in order to cover any additional damages that could not be made good by the retroactive application of Directive 80/987.[41] Reliance upon *Francovich* is also possible, when this is necessary to make up for any shortcomings of the available domestic remedies that escape the application of the principle of effectiveness. A very good example in this respect is given by the decisions in *Sutton*[42] and *Comateb*.[43] The applicants were reminded that they could claim through a damages suit everything that they had failed to receive under their principal entitlement and restitutionary action.[44] The mere existence of alternative courses of action does not thus preclude the complementary application of the *Francovich* principle, to the extent that the affected individuals do not receive the retroactive and complete reinstatement of both the substantive and the financial content of their infringed legal rights.[45]

To require in such circumstances the availability in the domestic courts of a public liability action does not infringe the principle of national procedural autonomy and the latitude that the latter leaves to the domestic legal orders.[46] Reliance upon this principle is made subject to the respect of the effectiveness

[38] The Court did not deal with the availability of a *Francovich* action in the scenario where the alternative remedies could offer full substantive and financial protection to the legal rights of individuals and did not answer whether an objection of parallel proceedings could be put forward against the applicant in such circumstances. The only discussion on this matter can be found in the Opinions of Advocates General Tesauro in *Brasserie/Factortame III* (points 100-104) and Léger in *Hedley Lomas* (points 193-201). The Court merely made a general reference to the principle of mitigation (*Brasserie/Factortame III*, par. 34-35).
[39] Cases C-94 & 95/95, *Bonifaci and Berto* v. *INPS* [1997] ECR I-3969.
[40] Case C-373/95, *Maso & Gazzetta* v. *INPS* [1997] ECR I-4051.
[41] *Ibid.*, par. 53 and 41 respectively. Also see *infra* 1.5.
[42] *Sutton* : *op cit.* No 36.
[43] Cases C-192 to 218/95, *Société Comateb* v. *Directeur Général des Douanes et Droits Indirects* [1997] ECR I-165.
[44] *Sutton* : *op cit.* No 36, par. 28 *et seq.*, *Comateb* : *ibid.*, par. 34. For more on these cases, see *infra* 1.4.
[45] *Bonifaci & Berto* : *op cit.* No 39, par. 51, *Maso & Gazzetta* : *op cit.* No 40, par. 39 (with regard to the retroactive application of belated implementing measures).
[46] *Supra* 0.2.

requirements. Indeed, the applicable national procedural rules should not be such as to render impossible or excessively difficult in practice the exercise of the legal rights of individuals.[47] Any discretion enjoyed thus by national law finds its limits in the need to guarantee compliance with the effectiveness principle. The domestic arrangements on public liability cannot consequently preclude the application of *Francovich*, when the payment of damages from the public funds serves to complement the substantive protection already available to individuals by virtue of alternative legal remedies.

1.4. The objection of parallel proceedings in the operation of Francovich as a genuine concurrent remedy : The question that still needs to be answered is whether the availability of a *Francovich* action is guaranteed, even to the extent that the plaintiff has alternative legal means at his disposal that can ensure in an equally effective way the judicial protection of his infringed legal rights. In order to avoid confusion, it should be made clear that the question examined in this context is not whether the case law can ever introduce a hierarchy amongst the judicial means provided for by the domestic legal systems.[48] What is asked is rather whether national law may impose on individuals the obligation to exhaust all alternative effective means, before they can finally proceed with their public liability actions.

It has to be recalled at this point that *Francovich* has been introduced as a principle inherent in the system of the Treaty.[49] This seems to imply that it is treated as an independent remedy, that exists and operates regardless of whatever national law arrangements on the matter. This being so, its autonomous nature should be guaranteed against any domestic provision and principle that subordinates its availability to the existence or absence of alternative effective remedies in the national courts. This is exactly the conclusion reached by certain academics[50] on the

[47] Principle of effectiveness, originating from the principle of practical possibility as introduced in Case 33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland (Rewe I)* [1976] ECR 1989. Also see *supra* 0.2.1.

[48] This question is dealt with to a certain extent by Dougan : 'The Francovich Right to Reparation : Reshaping the Contours of Community Remedial Competence', (2000) 6 *EPL* 103, p. 111.

[49] *Francovich* : *op cit.* No 2, par. 35.

[50] In this direction, Eeckhout : 'Liability of Member States in damages and the Community system of remedies', in Beatson/Tridimas (eds.) : *New Directions in European Public Law*, Hart Publishing 1998, pp. 63-73, at pp. 68-69. Also see Biondi and Johnson : 'The Right to Recovery of Charges Levied in Breach of Community Law : No Small Matter', (1998) 4 *EPL* 313, at p. 320

basis of their interpretation of the relevant judicial pronouncements in *Sutton*[51] and *Comateb.*[52] In the former case, the Court refused to accept that the applicant had the right to receive interest on arrears of social security benefits that had been awarded to her belatedly due to the misimplementation of Directive 79/7[53]. The relevant prohibition contained in the national legislation did not contravene the objectives pursued by Article 6 of the said measure. However, it was accepted that such an interest could be claimed on the basis and under the conditions of *Francovich.*[54] Even more emphatically, in *Comateb* the applicants were denied the right to recover the dock dues that they had been obliged to pay to the French authorities in contravention of Article 25 ECT. The Court argued that the national legislation which prohibited the recovery of charges already passed on to the market prevented the unjust enrichment of traders. That was an objective compatible with the aims and the system of protection established by the Treaty. It was nevertheless recognised to the applicants the right to bring a *Francovich* claim for any consequential loss arising from the unlawful levying of charges not due, irrespective of whether the latter had been already passed on by the affected traders.[55]

However, it should be seriously doubted whether it was indeed intended in these cases to recognise the right of individuals to bring a public liability action independently of the availability to them of an entitlement or a restitutionary remedy respectively. On the contrary, the relevant statements should be examined in their context. In both cases, the plaintiffs had already failed to receive interest and to recover the unlawfully levied sums. It was probably thus considered necessary to sweeten the pill, by indicating that a remedy was nevertheless open to them in the form of an action for damages. In both scenarios, *Francovich* was called upon to supplement and not to substitute the partial judicial protection offered to the applicants by the alternative legal means open to them. The approach might have differed, had the judicial means relied upon by the plaintiffs been capable of offering

[51] *Sutton* : *op cit.* No 36.
[52] *Comateb* : *op cit.* No 43.
[53] Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ 1979, L6/24).
[54] *Sutton* : *op cit.* No 36, par. 28 *et seq.*
[55] *Comateb* : *op cit.* no 43, par. 34. A similar statement can be found in Case C-242/95, *GT-Link v. De Danske Statsbaner DSB* [1997] ECR I-4449, par. 60.

complete protection to their infringed legal rights. Neither does it seem correct to accept that the different nature between the damages actions and the entitlement and restitutionary claims can allow the circumvention of the strict limitation periods within which the payment of money unlawfully withheld or levied by the national authorities should be requested.[56] The greater degree of culpability involved for the defendant under *Francovich* can explain why it is possible to succeed in claims, that would have failed on alternative grounds.[57] It does not nevertheless justify the use of damages suits as an indirect entitlement or restitutionary action, outside the national time-limits prescribed for the institution of such claims. That this is indeed so is shown by the operation in the *Francovich* field of the mitigation duty and the principle of national procedural autonomy.

1.4.1. The mitigation principle as a factor limiting the autonomous nature of Francovich claims : In some cases, the birth and increase of a certain damage is due wholly or partly to the failure of the plaintiff to avail himself correctly and in time of the legal remedies open to him in the national courts for the protection of his infringed legal rights.[58] The obligation of individuals to take all reasonable steps in order to prevent their loss from actually occurring or to at least limit its scale was originally introduced in the context of Community liability as a general principle deriving its validity from the common principles of the national legal orders.[59] Its application has already been extended in the *Francovich* field.[60] The violation of the mitigation duty may break the chain of causation between the breach committed by the defendant and the loss sustained by the applicant. Alternatively, it may affect the measure of compensation that the plaintiff will finally receive. In any event, the operation of the relevant principle has inevitably repercussions for the availability of damages actions.

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[56] Opinion of Advocate General Jacobs in Case C-188/95, *Fantask A/S and Others* v. *Industriministeriet* [1997] ECR I-6783, point 83.

[57] On the different nature between liability actions and restitutionary claims, see the Opinion of Advocate General Jacobs in Case C-90/94, *Haahr Petroleum Ltd. v. Åbenrå Havn* [1997] ECR I-4085, at point 170.

[58] For example, consider the case where the violation consists in the adoption of an administrative measure contrary to a directly effective provision. Suppose that the plaintiff has failed to bring an action for its annulment within the prescribed limitation period, when this would have prevented the birth of his loss or at least reduced its scale.

[59] Cases C-104/89 and C-37/90, *Mulder and others v. Council and Commission* [1992] ECR I-3061, par. 33.

[60] *Brasserie/Factortame III* : *op cit.* No 4, par. 84.

It should be understood that the denial of protection under *Francovich* to the extent that the applicant has contributed to his own loss because of his failure to prevent its birth or increase through the timely use of all effective legal means is not contrary to the autonomy of the principle of governmental liability. The availability of a damages action has the meaning that it enables the reinstatement of the financial content of a certain right, when its addressee cannot enjoy the actual benefit that the infringed provision intended to confer upon him.[61] It relaxes the injustice that any violation entails necessarily for the affected individuals and guarantees indirectly that the desired effect of the provision concerned will be partly attained, at least as regards its financial component. This does not mean that individuals are given the choice to sit back and wait for their loss to occur, in the knowledge that a damages suit will always be open to them. The rationale behind any liability action is that the applicant is compensated for a violation, which he could not prevent and which he cannot be thus blamed for. This is definitely not so when the loss could have been avoided or at least limited, had the injured person shown reasonable diligence by not failing to avail himself correctly and in time of the appropriate legal remedies open to him in the national courts.

Allowing the national legal orders to subject the admissibility of *Francovich* to the respect of the mitigation principle does not only serve the financial interests of the defendant, but has also the potential effect of making individuals more responsible in the protection of their legal rights. They realise that, if they simply sit back and allow their damage to occur, they will be called upon to undertake themselves the financial burden arising from their failure to mitigate the effects of the unlawful activity of the domestic authorities. This makes them more willing to resort to remedies that will lead to the termination of the breach at its early stages, rather than to the compensation of the financial loss that has already been caused to them. This is important for the reason that all legal systems have a clear interest in the reinstatement of the substantive content of any infringed provision. It is only in such a case that the violated norm can produce its desired effect with regard to the actual addressees of the rights and the obligations that it contains. The general

[61] Opinion of Advocate General Tesauro in *Brasserie/Factortame III*: *ibid.*, especially at point 34.

interest in substantive legality cannot thus tolerate or encourage practices which enable individuals to manipulate the legal means available to them and to make a choice as to whether they will allow their loss to occur and increase, when they have the power to prevent it or at least reduce its scale. On the contrary, both national authorities and the courts should be given the opportunity to put a quick and definite end to the anomaly that any violation of binding rules entails inevitably for the principle of legality.

However, the application of the mitigation principle should not reach the point to overburden the affected individuals by making the admissibility of their public liability claims subject to the previous exhaustion of costly legal actions regardless of their prospects of being successful. This would render the provision of individual protection excessively difficult, contrary to the principle of effectiveness. A very good example in this respect is given by the decision in *Metallgesellschaft*.[62] The applicants were subsidiaries of companies that had their seat in Germany. They had been obliged under national law to pay advance corporation tax in circumstances where they could have avoided doing so, had their parent company been resident in the United Kingdom. The Court concluded that this violated Article 43 ECT[63] and declared that the plaintiffs were entitled to an effective remedy either in restitution or in damages.[64] The argument was then put forward that the relevant claims should be refused or reduced, due to the fact that the applicants had not acted diligently. It was suggested that they could have avoided the payment of the tax by making a group income election or by applying for a tax credit, despite the fact that the national legislation prohibited such a possibility for any subsidiary of companies having their seat outside the United Kingdom. The claim would have been rejected by the Inspector of Taxes but his decision could have been challenged before the competent administrative authorities and the national courts, as infringing the principles of direct effect and supremacy. The failure to follow this route constituted a violation of the mitigation principle.[65]

[62] *Metallgesellschaft* : *op cit.* No 36.
[63] *Ibid.*, par. 35-76.
[64] *Ibid.*, par. 77-96.
[65] Observations of the United Kingdom Government in *Metallgesellschaft.*

The Court did not agree that this was indeed so. It held that the principle of effectiveness would be violated, if the claims of the applicants were rejected or reduced for the mere reason that they had failed to apply for a tax advantage which was unquestionably denied to them by national law. The sole possibility to challenge judicially or administratively the refusal of the tax authorities on the basis of the principles of direct effect and supremacy was apparently not considered enough to establish on its own a violation of the mitigation duty.[66] It appears that this conclusion was reached due to the uncertainty that the plaintiffs were placed in by the maintenance of inconsistent national legislation and the complexity of the procedures that had to be followed for the receipt of a very questionable remedy. If the applicants had chosen not to pay the tax before the determination of their appeals by the competent administrative authorities and the national courts, they would have been obliged to pay interest on the sums due and could have exposed themselves to the imposition of statutory penalties for having acted negligently and without reasonable cause. Even if they were successful in their appeal, they would have no right under national law for the reimbursement of the prematurely collected taxes.[67] It was thus considered that no violation of the mitigation principle could be possibly established on the specific factual background involved in that case.

1.4.2. Considerations affecting the autonomy of Francovich actions outside the field of application of the mitigation principle : However, there exists a dichotomy of opinions around the exact scope of the mitigation principle in the field of damages actions. Part of the doctrine seems to accept that the relevant duty is violated in any case that the plaintiff has failed to avail himself of a legal remedy, the timely reliance upon which would have made it wholly or partly unnecessary to resort to the institution of a liability action. It is immaterial whether this would have also affected the measure of the financial detriment originally suffered by the applicant.[68] This wide formulation of the mitigation principle is resisted by those who argue that the obligation to show reasonable diligence is infringed, only when

[66] *Ibid.*, par. 106.
[67] *Ibid.*, par. 104.
[68] For example, Eeckhout : *op cit.* No 50, p. 71 and Dougan : *op cit.* No 48, p. 111.

the failure to use in time the existing legal remedies has led to the actual increase of the loss that the affected individual has sustained.[69]

In some cases, a violation of the mitigation principle will be established under both theories. It cannot be thus contested that there is a clear absence of diligence, when the applicant has failed to ask for interim protection against the infringement of his legal rights. However, things will not be always so uncontroversial. For example, consider that a given individual has been obliged to pay an illegal tax. The financial detriment complained by him consists in the amount of the money, that the domestic authorities have collected unlawfully. Under the wide formulation of the mitigation principle, his failure to bring a timely restitution action should bar his liability claim. Indeed, what he is asking coincides with what he could have got under an alternative effective remedy. This is not equally so under the narrow conception of the mitigation duty. Even the immediate institution of proceedings for the recovery of the unlawful tax would not have affected the measure of the financial detriment originally suffered by the applicant, which always corresponds to the amount of the illegally collected money. Given the above controversy, it is wondered whether there might exist more general justifications operating outside the field of the mitigation principle for establishing that the domestic legal orders are indeed entitled to make the availability of *Francovich* subject to the previous exhaustion of all effective national remedies.

The answer probably lies in the familiar principle of national procedural autonomy. The discretion that national law used to enjoy in the field of judicial remedies and procedures has certainly been progressively curtailed.[70] It has been clearly established that, when the principle of effectiveness so requires it, the national courts will be obliged to apply existing remedies in novel circumstances and to make available to the applicant legal means which could not have been relied upon for the protection of similar rights of a domestic nature.[71] However, it is still accepted that the domestic legal orders are free to apply their national rules on remedies and procedures so long as this does not affect the measure of the judicial

[69] In this direction, the Opinion of Advocate General Jacobs in *Fantask : op cit.* No 56, at point 82.
[70] *Supra* 0.2.1. and 0.2.2.
[71] For example, Case C-213/89, *R. v. Secretary of State for Transport, ex parte Factortame Ltd and others* [1990] ECR I-2433.

protection required for the legal rights of individuals. The logical conclusion should thus be that the autonomy of the damages actions exists only to the extent that their subordination to the previous exhaustion of all other available legal means would prejudice the effective protection of the rights of individuals and undermine the attainment of the objectives pursued by the law. On the contrary, when the rights of the applicant can be fully safeguarded through reliance on the alternative legal remedies available in the national courts, this autonomy should generally be allowed to give way.

1.4.2.1. Francovich and national remedies offering effective substantive protection : The subordination of damages actions to alternative effective remedies is particularly desirable, when the successful reliance upon the latter will lead to the reinstatement of substantive rather than merely financial legality. It is in the clear interest of justice to ensure that the infringed provision will apply and produce its intended legal effects. The financial reinstatement of a given right might be necessary in order to remedy or complement the lacking substantive protection, but this does not change the fact that it remains the second best solution.[72] Substantive reinstatement constitutes always the optimum means of protection.[73] The subsidiary nature of *Francovich* under such circumstances also serves the interest of the defendant to give a quick end, in the context of a procedure specifically designed for this purpose, to the anomaly that any violation committed by the public authorities entails for the national legal order. This is necessary in order to protect the public purse and the financial interests of the tax-payers from the imposition of a financial burden that could have been lighter, had the illegality giving rise to it been established and cured much earlier through the timely use of the mechanisms available for this purpose. It also helps avoid the possibility of administrative measures surviving under the shadow of illegality. From a political point of view, allowing the domestic systems to promote other remedies over the *Francovich* principle when this does not affect the objectives pursued by the doctrine and the

[72] This seems to be the conclusion to be drawn from the decisions in Case C-334/92, *Wagner Miret* [1993] ECR I-6911, par. 23 and Case C-91/92, *Dori v. Recreb Srl* [1994] ECR I-3325, par. 27. For more on these cases, see *infra* 1.4.3.2.
[73] Opinion of Advocate General Tesauro in *Brasserie/Factortame III* : *op cit.* No 4, at point 34.

measure of protection that is made available to the legal rights of individuals permits to take account of the sensitivities that national courts naturally have in holding their own government liable in damages, especially when the case concerns a breach committed by the legislature. This helps avoid the creation of unnecessary tensions in the relationship between the Community and the national judiciary.

1.4.2.2. Francovich and national remedies leading to financial reinstatement : There is no objection to the subsidiary operation of *Francovich*, even when the benefit that the infringed provision intended to confer on the plaintiff is of a pecuniary nature. In such a case, its substantive and financial content coincide with the consequence that the claim under all available courses of action can only be for financial reinstatement. However, a damages suit could operate in such circumstances as a means of circumventing the usually shorter time-limits prescribed for the institution of the entitlement and restitution actions provided for under national law.[74] In its current state of affairs, the case law considers clearly as worthy of protection the national interests that the imposition of reasonable limitation periods wishes to serve. Indeed, the deadlines set by the domestic legislation for the initiation of judicial actions purport to strike a fair balance between the individual and the general interest and serve the principle of sound administration.[75] The national courts are thus empowered to set them aside, only to the extent that they violate the requirements of effectiveness and equivalence.[76] Reasonable limitation periods that do not discriminate in favour of domestic law actions can be disapplied in the context of a given litigation, only when it is shown that the delay in instituting proceedings is due to the deliberately misleading conduct of the defendant.[77] The domestic legal orders should thus be allowed to protect the time-limits prescribed with regard to entitlement and restitution actions from being

[74] This danger was emphasised by Advocate General Jacobs in Case C-2/94, *Denkavit Internationaal and others v. Kamer van Koophandel en Fabrieken voor Midden-Gelderland and others* [1996] ECR I-2827, at point 80 of his conclusions. However, see his contradictory statement in *Fantask : op cit.* No 56, at point 83 of his conclusions.

[75] For example, Case C-338/91, *Steenhorst-Neerings v. Bestuur van de Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen* [1993] ECR I-5475.

[76] However, note that for the time being there is considerable uncertainty as to when there is a violation of those principles. For an interesting discussion on the issue, see Case C-261/95, *Palmisani v. INPS* [1997] ECR I-4025.

[77] Case C-208/90, *Emmott v. Minister for Social Welfare* [1991] ECR I-4269 and Case C-326/96, *BS Levez v. TH Jennings Ltd.* [1998] ECR I-7835. Also see Flynn : 'Whatever Happened to Emmott ? The Perfecting of Community Rules on National Time-Limits', in Kilpatrick/Novitz/Skidmore (eds.) : *The Future of Remedies in Europe*, Hart Publishing 2000, pp. 50-67.

undermined by the initiation of *Francovich* claims for the attainment of objectives, which could have been effectively pursued through the timely institution of the appropriate national proceedings.

1.4.2.3. Francovich and national remedies directed against private parties : A final issue that has to be dealt with here concerns the situation where the rights of the plaintiff can be protected equally effectively under both *Francovich* and an alternative course of action, that needs to be brought against a private party rather than the public authorities. For example, consider that an unimplemented measure provides for the payment by employers of a certain financial benefit to a given category of employees. Following an avalanche of *Francovich* claims brought against it on the basis of its failure to adopt in time the required national implementing legislation, the defaulting government proceeds with considerable delay to the transposition of the measure in the domestic legal order. It gives at the same time retroactive effect to the implementing legislation and grants to its beneficiaries the right to claim from their employers everything that they would have been entitled to, had proper transposition actually taken place within the prescribed deadline. The question in such a case is whether the existence for the employees of the possibility to claim the benefit retroactively from their employers could bar the admissibility of their public liability action, at least with regard to its principal capital component.

Accepting in such circumstances the subsidiary operation of *Francovich* would practically allow the failure to adopt in time the national implementing legislation to remain unpunished, undermining thus the dissuasive function that the doctrine could otherwise perform with regard to the body responsible for this delay. Suffice it to note at this point that *Francovich* does not only provide financial satisfaction to the suffering individuals. It also dissuades the domestic authorities from repeating similar violations in the future and provides them with a further incentive to be more responsible in the exercise of their public duties, in order to minimise the danger of exposing the national treasury to the imposition of monetary liability. This is especially the case with regard to measures that require

implementation in the domestic legal order. A possible solution would be to accept that even in such circumstances national law can require the previous exhaustion of all alternative domestic courses of action, under the condition that the person prosecuted under them will be given the right to bring subsequently a *Francovich* action and to recover any damages that he has possibly suffered due to the failure of the public authorities to ensure compliance with their respective obligations.[78] However, there is nothing to suggest that there will be an extensive judicial intervention in the field under consideration so long as individuals receive one way or the other effective protection of their infringed legal rights.

1.4.3. The subsidiary nature of damages in the case law of the Court : The case law has not clarified yet whether the availability of a *Francovich* action is guaranteed, even when the reliance upon it will not add anything to the measure of protection offered to the plaintiff by virtue of the alternative national remedies available to him. There are nevertheless indications that the imposition of public liability is considered as an action intended to complement and not to substitute the protection already provided for by the existing national legal means. The relevant pronouncements have not been always made with regard to *Francovich*. However, it is necessary to examine them to the extent that they introduce solutions that can also apply in the field of governmental liability.

1.4.3.1. Lessons from the field of Community liability : The principles that govern the institution of damages suits for the illegal activity of the domestic authorities and the political institutions constitute in fact the two different sides of the same coin of public liability under the Treaty. There are thus very strong arguments for making them subject to the same rules and restrictions as concerns the scope and the conditions for their application. Their different treatment in certain exceptional cases can only be justified, if it can be established objectively on the basis of the differences that may exist in the objectives pursued and the functions

[78] Deards : "'Curiouser and Curiouser" ? The development of Member State liability in the ECJ', (1997) 3 *EPL* 117, pp. 143-145. Note at this point the difficulty of proving the existence of a sufficiently serious breach linked directly with the damage sustained by the applicant.

performed by the holders of the public power in each one of these two related areas.[79] It becomes thus necessary to examine the way in which the objection of parallel proceedings operates under the regime of Community liability. Indeed, there does not seem to exist any valid reason why the solutions on the matter should differ depending on whether the source of a given illegality can be traced in the activity of a domestic authority rather than a political institution.

It was initially established that the annulment of the allegedly unlawful measure that gave rise to the loss of the applicant was a necessary prerequisite for the admissibility of any action for damages against the defaulting institution.[80] However, it was soon realised that this approach would often lead to the negation of any kind of protection for individuals given the strict standing conditions that private parties have to meet for the introduction of direct annulment actions.[81] It was also understood that there would be cases, where the annulment of the contested measure would not offer any real protection to the applicant.[82] To subordinate damages actions in such circumstances to the previous initiation of successful annulment proceedings would merely make the whole procedure more burdensome, increasing unnecessarily the time that would be required for the reparation of the loss sustained by the plaintiff. After all, the validity of the contested act is examined anyway, when the time comes to decide whether damages should be paid to the applicant. Indeed, the success of the claim presupposes the existence of some kind of unlawful activity by the defendant. Placing thus emphasis on the different nature of the annulment and liability actions, the case law declared the autonomous nature of the latter.[83] Consequently, the previous annulment of an allegedly unlawful

[79] On the relationship between the two liability regimes and the way that they have influenced each other, see Tridimas : 'Liability for breach of Community law : Growing up and mellowing down ?', (2001) 38 *CMLRev* 301.

[80] Case 25/62, *Plaumann v. Commission* [1963] ECR 95, at p. 108.

[81] For more on this point, see especially Hartley : *The Foundations of European Community Law*, 4th edition, OUP 1998, pp. 349-377 and Arnull : 'Private applicants and the action for annulment since *Cordoniu*', (2001) 38 *CMLRev* 7.

[82] Consider the case where the adoption of an unlawful Community law measure had such an effect on the plaintiff that he was driven out of business and was forced into liquidation.

[83] On the differences between an annulment and a damages action, see especially Mead : 'The relationship between an action for damages and an action for annulment: The return of Plaumann', in Heukels/McDonnell (eds.) : *The Action for Damages in Community Law*, Kluwer 1997, pp. 243-258, and Meij : 'Article 215 (2) and Local Remedies', in Heukels/McDonnell (eds.) : *The Action for Damages in Community Law*, Kluwer 1997, pp. 275-276. Also see in this direction Cases 197 to 200/80, 243, 245 and 247/80, *Ludwigshafener Walzmühle Erling and others v. Council and Commission* [1981] ECR 3211 and the Opinion of Advocate General Dutheillet de Lamothe in Cases 9 & 11/71, *Cie d'Approvisionnemment de Trasport et de Crédit and others v. Commission* [1972] ECR 391, p. 411.

measure does not constitute as a general rule a precondition for the admissibility of the damages claim brought on its basis.[84]

The previous exhaustion of the administrative law remedies provided for by the Treaty is nevertheless required in those exceptional cases, where the plaintiff has the standing to bring an annulment action which can protect his infringed legal rights in a way equally effective with a damages action.[85] A damages action will be held thus inadmissible, when the loss complained of is equal to the monetary amount that the applicant would not have been obliged to pay or which he would have been entitled to receive by challenging timely and successfully the allegedly unlawful action or inaction that constitutes the basis of his public liability claim. The most interesting observation that arises from the relevant case law is that the inadmissibility of the liability actions in such circumstances is justified on the basis that the plaintiff would otherwise be allowed to circumvent the short limitation period prescribed for the institution of a direct annulment challenge, which was both available to him and objectively capable of offering full protection to his infringed legal rights.

This shows a wish to prevent the introduction of damages as a means for the indirect challenge of measures that could have been contested effectively under the annulment mechanisms provided for by the Treaty, but which became definite due to the failure of the plaintiff to institute the relevant proceedings either at all or in time. A very characteristic example of the policy followed in this field is given by *Cobrecaf*.[86] The case concerned an action for the annulment of the explicit refusal of the defendant institution to grant increased aid to the applicants. The action had been brought outside the deadline prescribed for the institution of such a direct challenge. The plaintiffs asked alternatively for damages, to the amount of the additional aid

[84] Case 4/69, *Lutticke v. Commission* [1971] ECR 325, par. 6 and Case 5/71, *Zuckerfabrik Schöppenstedt v. Council* [1971] ECR 975.

[85] This case law started developing in the context of Community staff cases. The applicants were claiming exactly the loss suffered due to the fact that either they were not chosen for appointment at a certain post or were not promoted to a higher grade (for example, Case 543/79, *Birke v. Commission and Council* [1981] ECR 2669, par. 23-28, Case 799/79, *Brückner v. Commission and Council* [1981] ECR 2697, par. 14-20, Case C-346/87, *Bossi v. Commission* [1989] ECR 303, par. 30-35 but Case T-27/90, *Latham v. Commission* [1991] ECR II-35 etc.). This case law has now been extended to all areas of Community law since Case 175/84, *Krohn v. Commission* [1986] ECR 753, par. 30-34. Also see Case T-514/93, *Cobrecaf v. Commission* [1995] ECR II-621, par. 58-61, Case T-93/95, *Bernard Laga v. Commission* [1998] ECR II-195, par. 48-49, Case T-68/96, *Polyvios v. Commission* [1998] ECR II-153, par. 32-45, Case T-94/95, *Landuyt v. Commission* [1998] ECR II-213, par. 48-49. Also see Mead : *op cit.* No 83.

[86] *Cobrecaf*: *ibid.*

that they were refused. Their claim was rejected on the basis that the autonomy of liability suits does not apply, when the applicants could have received equivalent protection by bringing a timely annulment action against the measure that constitutes the source of their loss.

The rationale underlying the strategy followed on this point is not difficult to be found. The successful reliance upon an annulment action cures retroactively and with an *erga omnes* effect the anomaly that the adoption of an unlawful measure and the failure to adopt a legally binding act entails. An action for damages produces a much more limited effect. It merely reinstates the financial content of the infringed individual right and concerns only the parties involved in a given dispute. Both principles of legality and legal certainty are served much better by the annulment of the unlawful measure and the adoption of the required act than by the payment of damages to those suffering loss due to the violation by the defaulting institution of its respective obligations. On the one hand, the wrongdoer should be given quickly the chance to remedy the anomaly that its activity has given rise to. On the other hand, the legitimate expectations of individuals basing their conduct on the belief that a certain measure is valid should be protected. At the same time, the quick reinstatement of substantive legality also safeguards the financial interests of the defendant. The earlier a legal anomaly is established and remedied, the smaller will be the number of damages actions brought against it on the basis of the existence of an unlawful act or omission.

The general idea inspiring the relevant case law seems to be that, in the existence of several courses of action offering equivalent protection to the affected individuals, the institution of liability proceedings should come last. This policy obviously affects the autonomous nature of damages claims. Given the limited effect that they produce and the dangers that they entail in terms of circumvention of the short limitation periods prescribed for other administrative law remedies, their autonomy is guaranteed only to the extent that the affected individuals do not have access to alternative means capable of offering an effective protection to their infringed legal rights. There is an analogy to be drawn at this point with the case law on the relationship between direct annulment actions and preliminary rulings on

matters of validity. It is thus now accepted that private parties can only plead the illegality of individual acts in the national courts, if they did not have clear and unquestionable standing to bring in time a direct annulment challenge.[87] This is clearly in view of the fact that the opposite solution would undermine the objectives that the short limitation periods prescribed for the institution of direct annulment claims pursue.

That damages are generally considered of a subsidiary nature is further shown by the relationship of the liability actions against the political institutions with the legal means available to the affected individuals in the national courts. The position was originally adopted that the applicant should exhaust all available domestic remedies, before he could finally proceed with an action for damages against a given institution.[88] Later on, this case law was mitigated and it was clarified that such an obligation exists only for those local remedies that can actually guarantee the effective protection of the infringed legal rights of the plaintiff. The policy followed on this point is thus exactly the same as the one determining the relationship between damages claims and direct annulment actions.[89]

1.4.3.2. The indications provided for in the Francovich-related field : The case law on governmental liability actions seems to confirm that *Francovich* is a remedy of last resort, basically intended to make up for the unavailability in some cases of substantive protection under the doctrines of direct effect and consistent interpretation. The first indications in this respect were provided for in the cases of *Wagner-Miret*[90] and *Dori*.[91] The Directives involved in these litigations could not be relied upon directly by the applicants. This was either because their provisions did not satisfy the direct effect requirements or due to the fact that their direct reliance was attempted against a private party. Reference was then made to the principle of

[87] Case C-188/92, *TWD Textielwerke Deggendorf v. Bundesminister für Wirtschaft* [1994] ECR I-833.
[88] Cases 5, 7 & 13 to 24/66, *Kampffmeyer v. Commission* [1967] ECR 245 and Case 96/71, *Haegeman v. Commission* [1972] ECR 1005.
[89] Case 281/82, *Unifrex v. Commission and Council* [1984] ECR 1969. Also see, *Krohn* : *op cit.* No 85, par. 24-29, Case T-167/94, *Nölle v. Council and Commission* [1995] ECR II-2589, Case T-18/99, *Corbis Obst und Gemüse Groëhandel GmbH v. Commission* [2001] ECR II-913, par. 22-29, Case T-30/99, *Bocchi Food Trade International GmbH v. Commission* [2001] ECR II-943, par. 27-34 and Case T-52/99, *T. Port GmbH & Co. KG v. Commission* [2001] ECR II-981, par. 22-29.
[90] *Wagner-Miret* : *op cit.* No 72.
[91] *Dori* : *op cit.* No 72.

consistent interpretation. It was declared that the domestic authorities would be called upon to make good any damage caused to individuals due to their failure to adopt in time the required national implementing legislation, if the result prescribed by the said measures could not be achieved by means of interpretation.[92] This statement can certainly be interpreted as a simple reminder to the applicants that they could still bring a liability action on the basis of the *Francovich* doctrine, even in case of failure to receive protection under the principles of direct and indirect effect. However, the language used therein gives rise to the impression that liability is merely the third best solution for the resolution of the injustice that any given violation is giving rise to.

A very interesting statement in this respect has been made in *Lindöpark.*[93] The case concerned a development company, which ran a golf course for the exclusive use of businesses. Under national law, the company golf activity had been exempted from the payment of value added tax. As a result, the plaintiff was not entitled to deduct input value added tax incurred on goods and services used for the purposes of this activity. It claimed that Directive 77/388[94] precluded national legislation from introducing such a general exemption for the supply of premises and other facilities and the related supply of accessories and other arrangements for the practice of sports and physical education. It then went on to bring a *Francovich* action, on the basis of the failure to implement this measure correctly in the domestic legal order. In the context of a ruling given under the preliminary reference procedure, it was established that the alleged misimplementation had indeed taken place.[95] It was also found that the provisions of the said measure were sufficiently clear and precise to allow the direct reliance upon them.[96] In the light of this finding, it was finally emphasised that the applicant could pursue retroactively the debts allegedly owed to it by basing its claim directly on the provisions of the misimplemented measure which were in its favour. It was thus concluded that an

[92] *Wagner*-Miret : *op cit.* No 72, par. 23, Dori : *ibid.*, par. 27. Also Case C-54/96, *Dorsch Consult Ingenieurgesellschaft mbH v. Bundesbaugesellschaft Berlin* [1997] ECR I-4961, par. 45 and *Carbonari* : *op cit.* No 21, par. 52.
[93] *Lindöpark* : *op cit.* no 3.
[94] Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes (OJ 1977, L145/1).
[95] *Lindöpark* : *op cit.* No 3, par. 17-28.
[96] *Ibid.*, par. 29-33.

action for damages on the basis of *Francovich* did not seem at first sight to be necessary on the facts of that case.[97] This statement reinforces the impression that *Francovich* is treated as a remedy complementary to the alternative legal means available in the national courts. *Lindöpark* seems to suggest that there would be no objection, if national law obliged the applicant to bring its claim under an entitlement action with the availability of a liability suit being reserved for any further loss that could not be recovered under the direct effect doctrine.

Further indications towards the same direction have been furnished by the decision in *Metallgesellschaft.*[98] One of the questions referred to in that case asked whether reparation for an unlawfully collected advance corporation tax should be sought under a restitution or a damages action. It was opined that it would be much more logical in this respect to treat the claim as a restitutionary one.[99] The possibility to require from the plaintiffs the satisfaction of the *Francovich* requirements was examined only as a remote and unlikely alternative.[100] The approach of the Court on this point was much more reserved. It declared that it was not within its duties and powers to assign a legal classification to the actions brought before the national court.[101] It was rather for the applicants to specify the nature and basis of their actions, under the supervision of the competent national judge.[102] In the circumstances of the case, they should be offered an effective remedy in order to obtain reimbursement or reparation of the financial loss which they had sustained.[103] The action could thus be either in restitution or in tort, provided that the effectiveness requirements were met.

The implication behind this statement is that Community law does not interfere with the nature of the action that the plaintiffs will bring in their national courts, so long as the principle of effectiveness is satisfied. Arguably, this also means that it does not further interfere with the domestic arrangements on the hierarchy of the legal means provided for by national law for the protection of the

[97] *Ibid.*, par. 35.
[98] *Metallgesellschaft* : *op cit.* No 36.
[99] Opinion of Advocate General Fennelly in *Metallgesellschaft* : *ibid.*, at point 52.
[100] *Ibid.*, points 53-56.
[101] *Metallgesellschaft* : *ibid.*, par. 81.
[102] *Ibid.*
[103] *Ibid.*, par. 96.

infringed rights of individuals. The only condition that it places in this direction is that the effectiveness requirements are somehow satisfied. It now appears that each case will have to be examined in its context, in order to ascertain whether the domestic legal system concerned offers alternative means to the plaintiff which allow him to protect effectively his affected legal rights under reasonable limitation periods and standing requirements. It is only when this is not so, that the defendant in a *Francovich* action is precluded from putting forward an objection of parallel proceedings against the applicant. This is also the position of the three Advocate Generals, who have examined in their conclusions the relationship of liability actions with the alternative remedies provided for in the national courts.[104]

However, the alternative national remedy available to the plaintiff should not only be effective, but it must also comply with the principle of equivalence. In other words, it must not discriminate against the applicant with regard to individuals bringing similar claims of a domestic nature. This is well exemplified by *Levez*.[105] The case concerned a female employee, who had been deceitfully given by her employer a lower salary than her male predecessor in the job. When she was finally informed about this, she sought to recover arrears of equal pay. The problem was that her action had been already time-barred under the domestic legislation, which restricted entitlement to arrears of remuneration to two years prior the institution of proceedings by the victim of the alleged sex discrimination.[106] On the facts of the case, it was found that this restriction violated the principle of effectiveness.[107] However, it was suggested that the applicant had an alternative remedy before the county court based on the tort of deceit. This enabled her to receive protection against her employer without the application of the contested limitation period.

In response to that argument, it was accepted that the possibility to rely upon an alternative effective remedy before a different court would have the effect that it could no longer be considered that national law made excessively difficult the protection of the rights of the plaintiff through the temporal restriction of her

[104] Advocate General Tesauro in *Brasserie/Factortame III* : *op cit.* No 4, at points 100-104, Advocate General Léger in *Hedley Lomas* : *op cit.* No 4, at points 193-201 and Advocate General Jacobs in *Denkavit Internationaal* : *op cit.* No 74, at point 80.
[105] *Levez* : *op cit.* No 77.
[106] Section 2(5) of the Equal Pay Act 1970.
[107] *Levez* : *op cit.* No 77, par. 31-32.

entitlement to arrears of remuneration.[108] It was nevertheless added that this could be so, only to the extent that the alternative course of action met the equivalence requirements and did not oblige the applicant to meet more restrictive conditions than those applicable with regard to similar domestic claims.[109] The repercussions that this entails for *Francovich* are immediately apparent. A national rule that makes the availability of public liability suits subject to the previous exhaustion of the existing domestic remedies will contravene the effectiveness requirements, when the alternative courses of action prescribe rules and conditions that fail the principle of equivalence. It does not matter in this respect that the individuals can possibly receive through them the full reinstatement of their infringed legal rights.

1.5. Francovich and retroactive application of belated national implementing measures[110] **:** The indications towards the direction that the availability of a *Francovich* action is guaranteed only for those individuals whose rights are not effectively protected in the national courts by alternative legal means were further reinforced after the judicial clarification of the relationship between the doctrine of public liability and the technique of the retroactive application of belated national implementing legislation.[111] The issue arose following the adoption by Italy of a controversial legislative decree, as a response to the decision in *Francovich.*[112] This measure implemented belatedly Directive 80/987[113] and identified the national security institute as the body responsible for the payment of the guarantee provided for by its provisions. The originality of the decree consisted in the fact that it was made applicable not only to the claims that would arise after its entry into force, but also to the payment of the compensation that individuals might be entitled to due to the belated transposition of the measure that it intended to give effect to.[114] It also provided that all actions brought on its basis should be instituted within one year

[108] *Ibid.*, par. 38.
[109] *Ibid.*, par. 50-52. For more on this issue, see Tridimas : 'Enforcing Community Rights in National Courts : Some Recent Developments', in Kilpatrick/Novitz/Skidmore (eds.) : *op cit.* No 77, especially pp. 47-49.
[110] Also see Anagnostaras : 'State liability v. Retroactive application of belated implementing measures : Seeking the optimum means in terms of effectiveness of EC law', [2000] 1 *WebJCLI.*
[111] *Bonifaci & Berto* : *op cit.* No 39, *Palmisani* : *op cit.* No 76, *Maso & Gazzetta* : *op cit.* No 40. Also, *Carbonari* : *op cit.* No 21. For a more detailed discussion of the decisions of the Court in these cases, see Odman : (1998) 35 *CMLRev* 1395.
[112] *Decreto Legislativo* No 80 (1992) GURI No 36 of 13 February 1992.
[113] Council Directive 80/987/EEC : *op cit.* No 9.
[114] Article 7 (2) of the Legislative Decree.

from its adoption, whereas claims based on the general system of civil liability prescribed by national law are subjected to a much longer limitation period of five years. This amounted in practice to the introduction of an unprecedented legislative system, providing for the payment of compensation by a public body for the belated adoption of national implementing measures.

Very soon, the national courts were called upon to decide whether the claims arising from the failure to introduce in time the relevant implementing legislation should be brought on the grounds of *Francovich* or rather on the basis of the adopted legislative decree. Certain of them, placed emphasis on the need to establish a link between the responsibility for the belated transposition of the measure in the domestic legal order and the resulting compensation that individuals were entitled to. They thus concluded that allowing a damages action on the basis of the general system of civil liability prescribed by national law would echo better the *Francovich* jurisprudence.[115] Certain others, came to the opposite conclusions and accepted that all claims had to be brought against the specified guarantee institution and not against the central government.[116]

These decisions have to be examined in the light of the domestic arrangements on the liability of the Italian State, as they stood at the time that *Francovich* was decided.[117] The point of departure should be the distinction employed by the Italian legal order between *norme di relazione* and *norme di azione*. The former govern the relationship between the public administration and the citizens and give rise to the birth of subjective rights. The latter merely regulate the administrative function and are the sources of simple protected interests. The practical importance of the distinction lies in the fact that until very recently it was accepted in Italy that public liability actions could only arise with regard to provisions containing a subjective right. In practice, the criterion used by the courts was that of the existence or not of discretion on the part of the body responsible for the violation. It was only when such a discretion was missing, that a subjective right

[115] For example, *Pretura di Pistoia*, decision of 16 November 1992, [1993] *Mass. giur. lav.* 97 and *Pretura di Bassano del Grappa*, decision of 9 July 1992.
[116] For example, *Pretura di Camerino*, decision of 13 May 1993.
[117] For more on this issue, see Merola/Beretta : 'Le droit Italien', in Vandersanden/Dony : *op cit.* No 28, pp. 289-349 and Zampini : 'Responsabilité de l'Etat pour Violation du Droit Communautaire : L'Example de l' Italie', (1997) 13 *RFDA* 1039.

and the corresponding entitlement to receive damages could ever arise. One can easily thus understand the problems involved in the imposition of public liability on the legislature. This was especially so, when its violation consisted in the failure to implement in time measures lacking the direct effect requirements. Indeed, such measures presuppose by definition a great margin of discretion as to the way that they will be transposed in the domestic legal order. This situation has progressively changed and it is now accepted that public liability can arise with regard to any violation affecting an individual interest significant for the national legal order, regardless of whether it concerns a subjective right.[118] However, this development had not taken place at the time when the said legislative decree was adopted. This gave rise to controversy as to whether national law contained indeed a legal basis capable of ensuring compliance with the *Francovich* jurisprudence.

When called upon to rule on the issue, the *Corte di Cassazione* declared that any action had to be brought on the basis of the legislative decree.[119] It recalled that it is for the national courts to determine the existence of liability, according to their relevant domestic rules.[120] It interpreted this autonomy as enabling it to apply the domestic distinction between subjective rights and protected interests and to examine whether the national legal system offered any basis for the establishment of legislative liability. It noted that the national constitutional arrangements elevate the exercise of the legislative power to an expression of political will, which may not be possibly made subject to any judicial control. It then went on to declare that *Francovich* could not give rise under the general national system of civil liability to a subjective right with regard to the activity of the legislature. National law did not permit thus the reparation of damages sustained due to the belated adoption of national implementing legislation. The legislative decree was adopted with the specific purpose to fill in this gap, by imposing on the designated guarantee institution the obligation to make good any damage sustained in the period where

[118] *Corte di Cassazione* No 500, decision of 22 July 1999. For more details on this development, see especially Malferrari : 'State Liability for Violation of EC Law in Italy : The reaction of the Corte di Cassazione to *Francovich* and Future Prospects in Light of its Decision of July 22, 1999, No 500', (1999) 59 *Zaörv* 809.

[119] For example, *Corte di Cassazione* No 10617, decision of 11 October 1995 and No 401, decision of 19 January 1996, [1996] I *Il Foro Italiano* 503. For a detailed analysis of the reasoning of the court in those cases, see Malferrari : *ibid.*, especially pp. 814 *et seq.*

[120] *Francovich* : *op cit.* No 2, par. 42.

proper implementation had not yet taken place. According to the *Corte di Cassazione*, the adopted solution was compatible with the principle of national procedural autonomy and could guarantee the effective protection of the infringed legal rights of individuals.

Any doubts around the position that the Court might adopt with regard to this legislative decree were quickly dissolved. It was declared that *Francovich* is one more substitute for the correct implementation and enforcement of the law.[121] Provided that a measure has been properly transposed, the retroactive application in full of the belated implementing legislation can in principle remedy the loss suffered by individuals. However, any further damages arising from the inability of the applicants to enjoy at the appropriate time the rights that were intended to be conferred upon them should also be made good.[122] It was thus permissible to make the payment of all compensation subject to the initiation of a reparation action against the guarantee institution specified by the national legislation, with the exclusion of any parallel public liability claim brought on the grounds of the *Francovich* doctrine. The only possible exception to the above could concern actions for the payment of any extra damages and only to the extent that the legislative decree did not provide a basis for their recovery against the INPS.

These decisions fit well with the above argued position that *Francovich* constitutes a remedy complementary to any other legal means available in the national courts. It is not difficult to find why there cannot possibly be any objection to national provisions reserving the availability of public liability actions only to cases where the affected individuals do not receive effective and complete protection of their infringed legal rights through the retroactive application of belated implementing measures. The reinstatement of substantive legality with a prospective effect is coupled in such circumstances with the retroactive application of the national implementing legislation. The intended beneficiaries of the belatedly implemented measure receive thus by virtue of their own national law everything that they would have been entitled to in the event of timely transposition, provided

[121] Opinion of Advocate General Cosmas in *Bonifaci & Berto* : *op cit.* No 39, at point 55.
[122] In this respect, see the relevant statements in *Bonifaci & Berto* : *ibid.*, par. 51-54, *Maso & Gazzetta* : *op cit.* no 40, par. 39-42.

that they show the diligence to bring the relevant claim within the reasonable limitation period prescribed for that purpose. Any extra damages incurred in the meantime can be claimed on the basis of the doctrine of governmental liability. Given thus that the general interest in the reinstatement of substantive legality is served well through the retroactive application of the belated implementing measures, national law should not be precluded from giving priority to this technique over the payment of damages directly from the public treasury so long as individuals receive an effective measure of protection.[123] The rule should always be that the autonomy of the liability actions exists, only to the extent that it serves the interests of those who do not have access to alternative effective protection of a substantive nature. It should not be allowed to operate in a way as to substitute the existing national remedies, when reliance upon the latter would constitute a more appropriate cause of action in the context of a given litigation.[124]

[123] Opinion of Advocate General Mischo in *Francovich* : *op cit.* No 2, at point 59.
[124] Opinion of Advocate General Tesauro in *Brasserie/Factortame III* : *op cit.* No 4, at point 103.

Chapter Two : The notion of the State under Francovich and the capacity in which it needs to be sued.

2.1. Introduction : It is not immediately apparent whether a *Francovich* claim should always be available regardless of the capacity in which a given breach has actually been committed or whether certain sources of illegal conduct should escape completely the application of the doctrine. This is especially so, given that the payment of damages for violations attributed to the legislature[1] and the judiciary[2] continues to constitute a sacred cow in the majority of the domestic legal orders. It is further necessary to ascertain whether the receipt of compensation from the national treasury should also be possible for loss emanating from the illegal activity of regional and local authorities, as well as bodies entrusted with the performance of public duties and enjoying a privileged status under national law without constituting formally part of the public apparatus.[3] Once the personal scope of the doctrine has been properly determined, it will become necessary to examine the horizontal and vertical allocation of liability between the various branches of government and the bodies forming part of the public administration. Indeed, it may not be always clear the exact capacity in which the infringement complained of by the applicant has actually taken place.[4] It is also possible that the violation may have been committed by a legal entity enjoying a certain degree of autonomy from the central government. The question in such a case is whether the relevant liability action should be directed against the State as such or rather against the specific wrongdoer, the activity of which constitutes the basis of the loss sustained by the plaintiff.[5]

2.2. The unitary conception of the State under Francovich : One of the most striking features of *Francovich* is that the State is viewed as a single entity for the payment of compensation to the suffering individuals. This has been established in

[1] *Infra* 2.2.2.
[2] *Infra* 2.2.3.
[3] *Infra* 2.3.
[4] *Infra* 2.4.1.
[5] *Infra* 2.4.2.

Brasserie/Factortame III.[6] The violations complained of by the applicants in those cases were attributed to the national legislature. The referring courts asked for clarification on the repercussions that this fact could possibly have for the availability of a public liability action, given the very restrictive conditions that had to be met for the payment of damages for similar domestic law breaches. They were reminded in this respect that the doctrine had been introduced as inherent in the system of the Treaty.[7] The conclusion drawn from this fact was that the imposition of public liability should be possible, regardless of the capacity in which the national authorities have infringed their respective legal duties.[8] The need to ensure the uniform application of the law required that the obligation to pay damages could not be made dependent on the domestic rules governing the division of public powers.[9] All national authorities are obliged to comply with legally binding norms and the fact that a given breach has been committed by the legislature does not affect the right to obtain redress for any loss sustained as a result.[10]

The cases decided so far have clearly established that the imposition of public liability is possible with regard to breaches attributed to the administration[11] and the legislature.[12] The same has been declared *obiter* also as concerns judicial violations.[13] Inspiration has certainly been drawn at this point by the respective solutions on the imposition of public liability for breaches of international law obligations.[14] This unitary conception of the defendant employed by *Francovich* is also in perfect harmony with the judicial pronouncements under the public enforcement mechanism. Indeed, it is apparent from the case law developed in this

[6] Cases C-46 & 48/93, *Brasserie du Pêcheur v. Germany and R. v. Secretary of State for Transport ex parte Factortame Ltd.* [1996] ECR I-1029.
[7] *Ibid.*, par. 31.
[8] *Ibid.*, par. 32.
[9] *Ibid.*, par. 33.
[10] *Ibid.*, par. 34-35.
[11] Case C-5/94, *R. v. Ministry of Agriculture, Fisheries and Food ex parte Hedley Lomas* [1996] ECR I-2553, Case C-319/96, *Brinkmann Tabakfabriken GmbH v. Skatteministeriet* [1998] ECR I-5255, Case C-127/95, *Norbrook Laboratories Ltd. v. Ministry of Agriculture, Fisheries and Food* [1998] ECR I-1531, Case C-118/00, *Gervais Larsy v. Inasti* [2001] ECR I-5063.
[12] Cases C-6 & 9/90, *Francovich and Bonifaci v. Italy* [1991] ECR I-5357, *Brasserie/Factortame III* : *op cit.* No 6, Case C-392/93, *R v. HM Treasury ex parte BT* [1996] ECR I-1631, Cases C-178, 179 & 188 to 190/94, *Dillenkofer and others v. Germany* [1996] ECR I-4845, Cases C-283, 291 & 292/94, *Denkavit Internationaal v. Bundesampt für Finanzen* [1996] ECR I-5063, Case C-302/97, *Konle v. Republic of Austria* [1999] ECR I-3099, Case C-140/97, *Rechberger and others v. Austria* [1999] ECR I-3499, Case C-150/99, *Stockholm Lindöpark AB v. Swedish State* [2001] ECR I-493.
[13] *Brasserie/Factortame III* : *ibid.*, par. 34. Also see the Opinion of Advocate General Léger in *Hedley Lomas* : *op cit.* No 11, at point 114. In a more indirect way, the Opinion of Advocate General Mischo in *Francovich* : *ibid.*, at points 58-59.
[14] *Brasserie/Factortame III* : *ibid.* In this respect, see especially the Opinion of Advocate General Tesauro, at points 38-39.

area that the law stands completely indifferent as to the identity and status of the wrongdoer. It views the defaulting country as a single entity, that should not be allowed to take refuge behind its domestic arrangements in order to escape the legal obligations imposed upon it.[15] All the national authorities are bound by the effect of a judgment delivered in the context of such enforcement proceedings and they are all called upon to adopt any necessary measure in order to comply with it.[16] This obligation has often been interpreted as implying the right of the suffering individuals to receive compensation for whatever loss they may have already suffered due to illegal public activity.[17]

The conclusion that arises is that the right to claim damages from the public funds exists without national law being allowed to introduce any kind of immunity connected with the status of the wrongdoer in the domestic legal order. The opposite would often lead to the negation of any financial reinstatement and would compromise the attempt made by *Francovich* to dissuade the public authorities from violating their legal obligations under the threat of the imposition of a monetary penalty. This would endanger the uniform application of the doctrine, since the possibility of claiming compensation would depend on the existence or absence of a specific domestic law basis permitting the initiation of liability actions against the one or the other arm of government.[18] The need now arises to ascertain whether it is inherent in the national legal orders to provide for the imposition of some kind of public liability for breaches of their national law. It has to be recalled that the principles of effectiveness and effective judicial protection that the doctrine is based upon can justify the setting aside of the immunities that national law may recognise with regard to the performance of public functions, only if the imposition of governmental liability does not constitute for the domestic legal orders an entirely new remedy. In the opposite case, such a development will fall within the scope of the *Rewe II* prohibition.[19]

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[15] For example, Case 52/75, *Commission v. Italy* [1976] ECR 277, par. 14.
[16] Very characteristically in this direction, Cases 24 & 97/80, *Commission v. France* [1980] ECR 1319, par. 16.
[17] For example, see the Opinion of Advocate General Mischo in *Francovich* : *op cit.* No 12, at point 59.
[18] The operation of *Francovich* as a means of protecting the fundamental requirement of the uniform application of Community law was emphasised in *Brasserie/Factortame III* : *op cit.* No 6, par. 33. In the same direction, see the Opinions of Advocates General Mischo in *Francovich* (*ibid.*) and Léger in *Hedley Lomas* (*op cit.* No 11), at points 65 and 114 respectively.
[19] Case 158/80, *Rewe-Handelgesellschaft Nord mbH v. Hauptzollampt Kiel, (Rewe II)* [1981] ECR 1805, par. 44.

2.2.1. State liability for breaches committed in the performance of executive power : Damages actions between private parties have always been possible in all national legal orders. The imposition of public liability was nevertheless inconceivable in the ancient legal systems, even in those that operated on a democratic basis. The rationale in the latter case was that the citizens participated directly in the formation of the public will and that the exercise of public power was thus authorised directly by the totality of them. This excluded the possibility that public liability could ever arise with regard to specific individuals.[20] This early notion of sovereignty was further elaborated by the legal theory and practice and formed the basis upon which the immunity of the public authorities from damages suits was accepted for a very long period of time. Sovereignty was defined as the exclusive competence of the competence (*Kompetenz-Kompetenz*).[21] The State was entirely free to set the legal rules that would apply to its citizens and to determine the scope of its own competence. It would run counter to this notion of absolute sovereignty to accept that it could ever be held liable. This was because it had the absolute power to determine the scope of its activity and to extend it, if it so wished. At the same time, the position was put forward that the illegal activity of the public authorities could never be attributed to the State. According to this theory, any legal person enjoys legal personality only by *fictio juris*. It does not have the competence to express its own will but such an ability is only recognised to its organs, to the extent that they operate within the limits of their duties and competence. When the national authorities exceed the boundaries of their powers, the State cannot thus be held responsible for this. Its organs are not expressing its will, when they violate the duties entrusted to them. That explains why the establishment of public immunity from damages suits was often combined with the acceptance of the possibility to impose direct liability on the person responsible for the loss, that its illegal activity had caused to individuals.

However, the theory of public immunity was developed in a specific political context and became increasingly difficult to be sustained as the modern legal

[20] Pavlopoulos : *The civil liability of the State* I, Sakkoulas 1986, p. 60, Triantafyllopoulos : *Ancient Greek legal orders*, 1970.

[21] Jellinek : *Die Lehre von den Staatenverbindungen*, Haering 1882, pp. 35 *et seq.* and Carré de Malberg : *Contribution à la théorie générale de l'Etat* I, Editions de CNRS 1962.

thinking evolved towards the subordination of all legal subjects to the power of the law. As the monarchical dominance was challenged and parliamentary supremacy was taking over, the principle of legality made its appearance. According to it, any legal subject operates under the law and the jurisdiction of the courts. This holds true also for the administration. The public power must be exercised *sub lege* and not simply *per leges.*[22] The supremacy of the law as an expression of the general will and a manifestation of public sovereignty placed the courts under the duty to protect the principle of legality and to impose sanctions in case of its violation, even in the form of damages for executive and administrative breaches. In such circumstances, the receipt of compensation from the public funds for breaches committed by the national authorities appears as an expression of the principle of equality and serves the interests of corrective justice. The State constitutes a union of free and equal individuals that have agreed to subject themselves to legal rules and the exercise of governmental power, on the rationale that their objectives and welfare can be better attained through collective action. The fact that some of them have been entrusted with the performance of governmental duties does not make them more equal than those, for the sake of which this power is being exercised. When the pursuit of this common good exceeds the authorisation given by the individuals to the public authorities and causes injury to some of the citizens, it should be the community that will make good the loss sustained by them. This provides the foundation for the establishment of public liability on the concept of corrective justice.

Furthermore, it was established progressively that the notion of sovereignty lies with the citizens rather than the State as such. Any violation of the legislative products of the democratically elected national assembly constitutes a breach of the general will and the principle of public sovereignty. An important feature of sovereignty in its modern form is the power of its holder to set freely limits to its exercise and to require their respect by all legal subjects.[23] Seen in this perspective, it is precisely the violation by the public authorities of the principle of legality that

[22] Bobbio : 'The Rule of Men or the Rule of Law ?', in *The Future of Democracy*, Polity Press 1987, pp. 138-156.
[23] For more on the modern notion of sovereignty and the way that it was developed, see Carré de Malberg : *op cit.* No 21, pp. 234 *et seq.* and Jellinek : *Gesetz und Verordnung*, Mohr 1887, pp. 198 *et seq.*

constitutes a breach of the concept of public sovereignty. The imposition of the appropriate sanctions on the wrongdoer is nothing more than a means of restoring the upset *imperium*.[24] It is not thus simply inaccurate to base the recognition of absolute public immunity on the notion of sovereignty, but it could even be argued that such a conclusion would constitute itself a manifest breach of the principle it is supposed to emanate from. This is for the further reason that the relationship between any legal person and its organs is now considered to be an internal and functional one.[25] This allows to attribute to the public administration all kinds of acts performed by the domestic authorities in the exercise of their duties, regardless of whether they are legal or illegal.[26]

As a result, the payment of damages for breaches committed in the exercise of powers of an executive and administrative nature is nowadays accepted without difficulty in the totality of the countries that are called upon to apply the *Francovich* doctrine.[27] It is certainly true that there is an absence of uniformity of solutions in this respect. The majority of the national legal systems offer some kind of a concrete legislative basis for the imposition of public liability.[28] However, its establishment on judicially developed principles is not a totally unknown phenomenon.[29] In some legal orders, the action for damages against the domestic authorities is made subject to a separate administrative regime.[30] In others, it is governed by the same system used for the imposition of ordinary civil liability but the relevant conditions usually differ.[31] The fact in any case remains that it seems to be unanimously accepted that the need to subordinate the domestic authorities to the principle of legality justifies the payment of damages from the national treasury, at least when the wrongdoer

[24] Pavlopoulos : *op cit.* No 20, p. 74.
[25] As introduced by Beseler : *Volksrecht und Juristenrecht*, 1843 and further elaborated and completed by Von Gierke : *Das deutsche Genossenschaftsrecht*, Akademische Druck-u Verlagsanstalt 1856.
[26] In the same direction, Pavlopoulos : *op cit.* No 20, p. 77.
[27] See the conclusions reached by Schockweiler/Wivenes/Godart : 'Le régime de la responsabilité extra-contractuelle du fait d'actes juridiques dans la Communauté Européenne', (1990) 26 *RTDE* 27. The same is also true as concerns the three countries that have since acceded to the Community. For example, see Andersson : 'Remedies for breach of EC law before Swedish courts', in Lonbay/Biondi (eds.) : *Remedies for Breach of EC Law*, Wylie 1997, 203-222, especially pp. 209-214.
[28] For example, the 1947 Crown Proceedings Act in the UK, Articles 839 (1) of the Civil Code (*Bürgerliches Gesetzbuch*) and 34 of the 1949 Fundamental Law (*Grundgesetz*) in Germany, Articles 105-106 of the Law introducing the Civil Code in Greece and Chapter 3, section 2 of the Tort Liability Act (*Skadestandslagen*) in Sweden.
[29] This is the case in France, where the relevant principle was firstly introduced in the famous *Blanco* judgment of the *Tribunal des Conflits* of 8 February 1873 under the condition that the imposition of public liability could not be either general or absolute.
[30] For example, in France, Greece and Sweden.
[31] For example, in Belgium (Articles 1382 *et seq.* of the Civil Code), Italy (Article 2043 of the Civil Code), The Netherlands (Article 1401 of the Civil Code) and Luxembourg (Articles 1382 *et seq.* of the Civil Code).

operates in its executive or administrative capacity. It is thus possible to conclude that at least the principle of public liability is clearly part of the tradition of all the modern legal systems.[32]

There are two basic consequences that seem to arise from the above conclusion. The first is that the application of *Francovich* should be accepted rather comfortably by the national courts with regard to breaches committed in the exercise of executive and administrative functions. Indeed, it will be only exceptionally that the relevant case law will require the substantial modification of the national arrangements on public liability in the specific area under consideration. A simple extension of the respective domestic solutions will usually suffice to ensure the respect of the principle of legality by the executive and administrative authorities and to justify the payment of damages from the national treasury, in case of their failure to do so. There is nothing revolutionary in such a development, from the moment that the imposition of public liability under such circumstances is extracted from general principles common to the national legal orders and constitutes nothing more than a concrete application of the familiar principle of equivalence.[33] That the judges are in a rather comfortable position with regard to the application of *Francovich* for breaches committed through administrative and executive activity is further testified by their tendency to attribute sometimes a certain illegal behaviour to the executive and administrative authorities, even when it seems that the primary wrongdoer is probably the legislature. In several cases, liability has thus been imposed for the failure of the competent minister to bring forward a required law project and for the application by the administration of inconsistent national legislation.[34]

Equally important for our purposes is the fact that public liability does not constitute a legal means which is totally unknown to the domestic legal orders. As a result, *Francovich* does not introduce a totally new remedy and does not create actions which are completely unavailable under national law.[35] The practical

[32] Opinion of Advocate General Tesauro in *Brasserie/Factortame III* : *op cit.* No 6, at point 13. Also see the answer given by Mr Delors on behalf of the Commission to written question No 2423/88 asked by Mr Gijs de Vries (OJ 1989, C276/25).
[33] *Supra* 0.2.1.
[34] *Infra* 4.2.3.1(e).
[35] *Rewe II* : *op cit.* No 19, par. 44.

importance of this finding is that the courts may be required to apply the doctrine even in circumstances where this would not have been possible for similar domestic law rights, if this is necessary to ensure the respect of the twin principles of effectiveness and effective judicial protection. The end consequence is that any immunity that national law may possibly recognise for certain types of public activity may be challenged under the effectiveness requirements.[36] This should be kept in mind, when examining the application of *Francovich* with regard to legislative and judicial breaches. Even where such violations do not give rise to liability under national law, damages may still be claimed under the doctrine.

2.2.2. Francovich and breaches committed in the performance of legislative power : The performance of legislative power is usually divided between the legislature proper and the executive power and is accordingly exercised by the national assemblies and the various ministerial and governmental departments. It is often argued that public liability for the performance of normative activity by the administrative authorities is nowadays accepted easily in all national legal systems.[37] However, this does not seem to be an entirely accurate statement. There is certainly a tendency towards the recognition of the possibility to order damages for the improper exercise by the administration of delegated legislative power. The fact nevertheless remains that in several legal orders the issue continues to give rise to considerable controversy and to divide doctrine and jurisprudence.[38] The matter becomes even more problematic with regard to the activity of the legislature proper. The possibility of bringing a public liability action for the adoption and the failure to adopt statutory legislation is still heavily restricted and sometimes entirely excluded in virtually the totality of the domestic legal systems.

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[36] *Supra* 0.2.3.

[37] See the conclusions reached by Schockweiler/Wivenes/Godart : *op cit.* No 27, especially p. 54 and Vandersanden/Dony : 'Rapport de synthèse', in Vandersanden/Dony (eds.) : *La Responsabilité des Etats Membres en cas de Violation du Droit Communautaire*, Bruylant 1997, pp. 353-388, especially p. 354. Also the Opinion of Advocate General Tesauro in *Brasserie du Pêcheur/Factortame III* : *op cit.* No 6, at point 37.

[38] For example, in Germany it is often contested whether public liability for the exercise of normative activity by the executive can ever meet the requirements of Article 839 (1) of the German Civil Code and especially that of the imposition of a duty with regard to a third person. Similar uncertainties have arisen in Greece, where the jurisprudence often rules out such a possibility either as a matter of principle or on the basis of the conditions of Article 105 of the Law introducing the Civil Code. Indicatively, see *Areios Pagos* 665/75, (1976) 2 *ToS* 495, *Areios Pagos* 1562/86, (1987) 35 *NoB* 1043, *Areios Pagos* 13/1992, (1992) 33 *HellDni* 1432. All these decisions accept that the State commits no wrong, when legislating or omitting to legislate by any of its organs.

Running the danger of oversimplification, the solutions adopted by the national legal orders on the imposition of public liability for legislative breaches can be possibly classified in four general categories. Such a possibility is often ruled out completely as a matter of principle.[39] The payment of damages for legislative activity is sometimes only accepted, when the legislature itself has provided specifically for it.[40] In most legal systems, the question remains theoretically open. The applicable conditions are nevertheless such, that practically amount to the exclusion of any prospect of success for the plaintiff.[41] There also exists a form of strict liability, imposed on the basis of the principle of equality before the public burdens.[42] In such a case, the plaintiff is required to show the existence of a special and abnormal damage. His compensation is excluded, when the contested provision serves the general interest. Furthermore, this objective liability regime presupposes the existence of a law imposing upon specific individuals a burden that should be borne by the general public. Its operation becomes thus problematic in case of loss arising from legislative inaction.[43] In brief, the only general principle that can be derived in this respect from the different legal orders seems to be that the imposition of liability for breaches attributed to the way that the legislative power is exercised by its holders is confined to very exceptional situations.

Despite this fact, reliance was made on the principle of effectiveness in order to dissociate the availability of *Francovich* from the domestic arrangements on legislative liability and to require its application also in circumstances where this would not have been possible under national law. In *Brasserie/Factortame III*[44], it

[39] This is basically the case in Belgium, Ireland, Luxembourg and the UK.

[40] This is accepted judicially in Italy (in this respect, see *supra* 1.5.) and legislatively in Spain, by virtue of Article 139.3 of the *Ley de regimen juridico de las Administraciones publicas y del procedimiento administrativo comun* (Law 30/1992 of 26 November 1992).

[41] In Denmark, Germany and Greece, public liability actions are compromised by the fact that the activity of the legislature almost always concerns the general interest. This practically excludes the possibility of the law being found as violating a duty towards specific persons or groups of persons, as required for the payment of damages from the national treasury. Very strict conditions also have to be met in The Netherlands, Portugal and Sweden.

[42] This is the case in France, where liability for legislative activity is only accepted on an objective basis according to the principle of *rupture de l'egalité devant les charges publiques*. This principle was introduced in the famous judgment of the *Conseil d'Etat* in *Société Anonyme des Produits Laitiers "La Fleurette"* [1938] *Rec. Lebon* 25 that put an end to the absolute immunity for the performance of legislative duties, introduced in *Duchatellier* [1838] *Rec. Lebon* 7. Also see Bronkhorst : 'The valid legislative act as a cause of liability of the Communities', in Heukels/McDonnell (eds.) : *The Action for Damages in Community Law*, Kluwer 1997, pp. 153-165, especially pp. 155-160 for more examples of cases where liability is imposed on an objective basis.

[43] For more, see Gohin : 'La responsabilité de l'Etat en tant que législateur', (1998) 50 *RIDC* 595, Alberton : 'Le régime de la responsabilité du fait des lois confronté au droit communautaire : de la contradiction à la conciliation ?', (1997) 13 *RFDA* 1017, Dony : 'Le droit Français', in Vandersanden/Dony : *op cit.* No 37, pp. 235-288.

[44] *Brasserie/Factortame III* : *op cit.* No 6.

was clearly declared that the fact that the breach may be attributed to the legislature is irrelevant for the receipt of protection under the doctrine. Even in such a case, individuals are entitled to claim damages for whatever loss they may have suffered due to the performance of illegal legislative activity.[45] What national law provides on the matter cannot affect the requirements inherent in the protection of their legal rights, including their entitlement to obtain redress in the national courts for any damage caused to them.[46] If this were not so, the availability of a *Francovich* claim would often be entirely fortuitous and would depend on whether the performance of a given duty had been entrusted under national law to the legislature or the administration. For example, consider the adoption of national implementing measures. This task is carried out sometimes by the legislature and sometimes by the executive, depending on the domestic arrangements on the matter. To accept in such circumstances the traditional principle of the infallibility of the legislature would link the measure of protection available to individuals in the context of a given legal order with the entirely incidental fact of whether the required implementing legislation has to be adopted by national statute or rather by normative administrative action.[47]

An interesting question that arises in this respect is why the liability of the legislature is given a different treatment than the one usually provided for under national law. It is thus necessary to examine why the payment of damages for legislative activity is so heavily restricted in most national legal orders and to determine what are the particular reasons that actually justify the adoption of more favourable solutions for individuals under *Francovich*. At a later stage, it also needs to be ascertained whether the receipt of compensation under the doctrine is possible even with regard to breaches attributed to the constitutional legislature. This is an issue that has not been tackled yet directly by the case law.

2.2.2.1. The infallibility of the legislature under national law : The theory of public immunity for breaches committed by the legislative authorities is based on

[45] *Ibid.*, par. 35-36.
[46] *Ibid.*, par. 35.
[47] In this respect, see especially the Opinion of Advocate General Mischo in *Francovich* : *op cit.* No 12, at point 65.

very strong theoretical foundations, deriving much of its validity from the position that the law holds in the modern legal systems. The transition from the monarchical regimes to the parliamentary democracies was accompanied by the progressive establishment of the principle of legality, in a clear effort to shield the citizens from the arbitrary exercise of public power. It was precisely this recognition of the primacy of the legislative function that gave rise to the birth and development of the theory of public immunity for the performance of legislative duties. Emanating from a democratically elected assembly, the law constitutes an expression of the *volonté générale.*[48] As such, it is seen as the supreme manifestation of public sovereignty. One of its most important characteristics is its power to bind everybody, without giving rise to any right to compensation.[49] The national delegation expresses the sovereignty of the people and cannot be accused of doing wrong by legislating and omitting to legislate.[50] Its activity can never thus give rise to public liability under a fault based regime. The infallibility of the legislative function found its supreme expression in the form of the principle of parliamentary sovereignty, which effectively substituted the old rule of the infallibility of the monarch. This theory continues to influence considerably the jurisprudence and to compromise the prospects of success of the relevant liability actions.[51]

Closely connected to the above, is also the argument drawn from the principle of separation of powers. This principle distinguishes between executive, legislative and judicial power and requires their exercise by different persons.[52] Its essence is clearly given by the classical statement that *il faut que le pouvoir arrête le pouvoir.* The argument is that the concentration of more than one power in the hands

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[48] This position originates from the relevant theories of Rousseau, as expressed in his famous work *Du contrat social.* His impact is evident in the 1789 *Déclaration des Droits de l'Homme et du Citoyen,* in Article 6 of which it is stated that "*La loi est l'expression de la volonté générale*". For more, see Carré de Malberg : *La loi, expression de la volonté générale,* 1931.

[49] In this respect, see Laferrière : *Traité de la juridiction administrative et des recours contentieux* I, 2nd edition, Berger-Levrault 1896, p. 12 : "Legislation is a sovereign act and a fundamental feature of sovereignty is that it binds all without anyone being entitled to compensation. The legislature itself may determine, in the light of the nature and seriousness of the damage and the needs and resources of the State, if it should grant such compensation. The courts cannot grant such compensation in its place". For a list of writers that have argued in the same direction in the context of different national legal systems, see Pavlopoulos : *The Civil liability of the State* II, Sakkoulas 1989, p. 139, footnote No 352.

[50] Michoud : 'De la responsabilité de l'Etat', (1895) 2 *RDpubl.* II 254.

[51] Appeal Court of Luxembourg, judgment of 1 April 1987, in *Poos v. Grand-Duché* (1987) L *Pas. Lux.* 68, *Areios Pagos* 13/92 and 1562/86 (*op cit.* No 38), *Areios Pagos* 37/57, (1957) 5 *NoB* 517, Brussels Civil Tribunal, decision of 5 June 1985, (1985) *Pas. Bel.* III 71 and Liège Civil Tribunal, judgment of 16 February 1993, (1993) *JJMB* 929.

[52] The principle of separation of powers in its modern version has basically been developed by Lock : *Two Treaties of Government,* 1609, II, 155 and 150 and, especially, Montesquieu : *De l'esprit des lois,* 1748, vol. XI, chapter 6. From the vast bibliography on this principle, see Troper : *La séparation des pouvoirs et l'histoire constitutionnelle française,* Paris 1980.

of the same person can lead to arbitrary conduct, endangering the freedom of individuals. The courts lack the democratic legitimacy and accountability of the directly elected national assembly. They are called upon to apply the law and to guarantee the subordination of all legal subjects to the principle of legality. They are not empowered to create law. This task belongs exclusively to the legislative authorities, which are also better equipped to take into account fine political considerations, undertaking at the same time the corresponding political cost.[53] Accepting thus the possibility of imposing liability with regard to the performance of the legislative function is often seen as an indirect means of censuring the legislative will. This is further interpreted as a violation of the democratic principle, that requires the courts to execute the law as expression of the *volonté générale*. At the same time, the argument is put forward that moving the boundaries between the legislature and the courts would also lead to the introduction of political conflicts in the judicial field. This would run clearly counter to the need to guarantee the impartial character of justice and the independence of the judges from the various political authorities.

At a more practical level, the immunity of the national legislature from damages suits is often attempted to be justified by reference to the general and abstract nature of the law. The legislative measures apply theoretically to an indeterminate number of persons and usually require a complex evaluation of the conflicting interests. Inevitably, they create winners and losers and may compromise the financial position of wide categories of individuals. If damages actions were open to all those suffering some kind of loss from the exercise of legislative functions, the legislature might be hindered in the exercise of its discretion by the prospect of public liability actions. In order to avoid such a danger, the payment of compensation is often excluded with regard to breaches of duties that are not directed towards specific persons but which rather concern the general interest.[54]

[53] In this direction, see the statements of the German Constitutional Court, (1981) 34 *NJW* 1657 and (1983) 36 *NJW* 2932.
[54] This is especially so in Germany, on the basis of the *Schutznormtheorie*. In order for the imposition of public liability to be possible, it is necessary to show that the provision infringed intended specifically to protect the individual bringing the damages action. A similar restriction is also imposed by many other national legal orders, either directly or indirectly. For example, in Greece Article 105 of the Law introducing the Civil Code excludes the payment of damages, when the breach concerns a provision that serves the general interest. In France, the jurisprudence of the courts has established that there can be no breach of the principle of equality before the public burdens, when the infringed provision concerns the public interest.

The public purse and the taxpayers would otherwise have to bear an unacceptably heavy burden, that could possibly endanger to a considerable extent the financial stability of the national treasury.

2.2.2.2. The normative justifications for the application of Francovich to breaches attributed to the national legislature : It is obvious that the exoneration of the legislative activity from any judicial control and the corresponding immunity from damages suits on the basis of the perception of the law as an expression of the public sovereignty, its irreproachable nature and the principle of separation of powers rests on the assumption that the legislature operates in an entirely unconditional and unlimited fashion. In order for the payment of damages to be possible under a fault based regime, there must exist a higher parameter of legality that will be used as a measure for the assessment of the activity of the national legislature. With the exception of certain provisions of a constitutional nature and the general principles of law, such a legal standard does not exist in the domestic legal orders. The law constitutes there the supreme expression of legality. This is not equally so with regard to *Francovich*. The discussion in this context is made on a completely different basis than the one concerning the payment of damages for legislative activity under national law.[55] The imposition of liability under the doctrine is ordered for violations of a hierarchically superior law, that has to be adhered to by the totality of the domestic authorities.[56] The need to guarantee the respect of this primacy can authorise the imposition of judicial sanctions against any wrongdoer, without the recognition of privileges and immunities.

That the legislature can be held liable for the violation of superior legal rules has been established on various occasions, even outside the field occupied by *Francovich*. The imposition of public liability for legislative breaches has thus been accepted repeatedly for violations of international law[57] and of provisions referring

[55] In this respect, see especially the decision of the Brussels Tribunal of First Instance of 9 February 1990 in *Michel and others v. Office National des Pensions et l'Etat Belge*. Also the judgment of the Liège Court of Appeal of 25 January 1994, (1995) *JMLB* 425.

[56] Case 6/64, *Costa v. ENEL* [1964] ECR 585

[57] In international law, the capacity in which the State has committed the violation is completely irrelevant. Indicatively, see the judgment of the Permanent International Court of Justice of 13 September 1928 in the *Case concerning the Factory at Chorzów*. Also its judgment of 26 July 1927

to the protection of human rights.[58] This confirms that there exist legal rules, which operate at a level higher than the one of the national legislature. Their violation gives rise to the right to claim damages, regardless of the capacity in which the wrongdoer has operated. A similar situation arises with regard to breaches of constitutionally protected rights. The law was traditionally seen as the only means that could guarantee the respect of the rights of individuals. However, the absolute dominance of the legislative function would lead to exactly the opposite result. It would be indeed possible for each parliamentary majority to abuse its power and to substitute the tyranny of the legislature for that of the monarch. That is why it was thought necessary to subordinate the legislative activity to a higher parameter of legality and to impose clear limits on the freedom of action of the legislature, granting constitutional status to certain fundamental individual rights.

This development was accompanied by the progressive transition from the principle of legality to the concept of the rule of law.[59] According to it, even the performance of the legislative function should comply with certain predetermined superior rules. This led to the recognition of the need for some kind of judicial control over the constitutionality of the laws, even in countries the legal tradition of which excluded completely such a possibility until very recently.[60] Given the superior position that constitutional provisions hold in the national legal systems, there is currently a tendency in the doctrine to recognise the possibility of ordering damages for their violation by the national legislature.[61] This has also been accepted as a matter of principle by many national courts, although there are not yet any decisions imposing such liability for the existence of a legislative breach.[62]

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[58] For example, see the decision of the ECHR of 29 November 1991 in *Vermeire v. Belgium* (1992) 8 *RUDH* 525. It declared that individuals having suffered damage as a result of the maintenance of national legislation that has been found to contravene the ECHR could obtain compensation in the national courts. For the position of the national courts, see the decision of the Belgian *Cour d'Arbitrage* of 4 July 1991 in *Verrye* (1991) *RUDH* 589.

[59] For a detailed analysis of the concept of the rule of law and its historical evolution, see indicatively Chevallier 'L' Etat de droit', (1988) 104 *Rlypubl* 313 and Manitakis *The State governed by the rule of law*, Sakkoulas 1994.

[60] Since the introduction in 1958 of the *Conseil Constitutionnel*, a limited control over the constitutionality of laws that have not been yet promulgated has been accepted even in France. Equally important is the fairly recent creation of the *Cour d'Arbitrage* in Belgium.

[61] Generally see Schockweiler/Wivenes/Dedart *op cit* No 27, Vandersanden/Dony *op cit* No 37, Pavlopoulos *op cit* No 49, pp 131-167 and the references made therein to more specialised works.

[62] This is the case in Greece. In this respect, *Areios Pagos* 37/1957 (*op cit* No 51) and 13/1992 (*op cit* No 38), Athens Court of Appeal 4696/1978, (1979) 27 *NoB* 230, 9428/1981, (1982) 30 *NoB* 473 and 2174/1991, (1991) EDDD. In the same spirit, the relevant statement of the *Cour d'Appel de Liège* in its decision of 25 January 1994 which required the previous establishment of the irregularity of the contested provision by the *Cour d'Arbitrage* (*op cit* No 53). Also note the similar declarations of the German Constitutional Court, demanding the existence of an evident breach of the Constitution (*op cit* No 53).

Indeed, the constitutional provisions express the public sovereignty in its supreme form. To the extent that a certain legislative measure has been adopted in violation of them, it ceases to constitute the expression of the general will and the product of a legal authorisation given by the electoral body. The contested measure can no longer thus be considered as emanating from the sovereignty of the people. As a result, the legislature can be accused of having committed a fault, since its actions are not covered any more by the assumption that they have been authorised by the citizens. The imposition in such circumstances of public liability does not contravene the principle of separation of powers. When called upon to apply the law, the courts are required to give effect to the primacy of the infringed constitutional provision. The order of damages may prove necessary to ensure the financial reinstatement of the infringed constitutional legality. Denying thus the imposition of liability for the violation by the legislature of a higher ranking rule of law would constitute itself an infringement of the principle of separation of powers and not a natural extension thereof, confirming the subordination of the courts to the general will.

The same is the case with regard to legislative breaches under *Francovich*. The principle of supremacy imposes upon the courts the obligation to disregard any national provision that conflicts with the hierarchically superior legal norms.[63] It is very impressive that the existence of such an obligation is nowadays accepted even in those legal orders, that are still facing problems to recognise the exercise of judicial control over the constitutionality of their domestic legislation.[64] From the moment it is accepted that the law can be contested in the light of a higher parameter of legality, it is also recognised indirectly that some form of irregularity exists in the performance by the legislature of the duties entrusted to it. It is thus possible to establish that even the legislative function can constitute the source of a certain illegality, this justifying the judicial intervention for the reinstatement of the disturbed legality. After all, it would appear peculiar to accept the imposition of

[63] Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] 1 CR 629, p. 636.

[64] In France, the principle of supremacy and the consequences emanating therefrom are now accepted even by the *Conseil d'Etat* after its decision of 20 October 1989 in *Raoul Georges Nicolo* [1990] 1 CMLR 173. In Belgium, this had already happened since the decision of the *Cour de Cassation* of 21 May 1971 in *Minister for Economic Affairs v. Fromagerie Franco-Suisse "Le Ski"* [1972] CMLR 330.

judicial control with regard to the disapplication of national legislation and to deny it when it comes to ordering damages for loss sustained due to an illegality committed by the legislature.

The different position held by the legislature in the *Francovich* context also explains why it is not possible to justify the recognition of public immunity on the basis of the need to protect the discretionary choices that have to be made in the exercise of legislative activity. In the field under consideration, the legislature is not called upon to make difficult policy choices with regard to the adoption or not of a certain provision. It is rather required either to transpose a measure already adopted by the political institutions or to interpret the exact scope of its obligations under the primary and secondary legislation and to adjust its conduct to them. There is no freedom of choice as to whether to comply or not with the binding superior will, but any latitude left concerns exclusively the technicality of how such a compliance will be attained. In fact, the performance of the legislative tasks is so firmly tied to the objectives pursued by this superior parameter of legality that the position of the legislature resembles greatly that of the administrative authorities under national law.[65] If a certain limitation of its liability is to be accepted under *Francovich*, this can only be on the basis of the interpretative difficulties that it often encounters in its effort to comply with the legal obligations imposed upon it. Any such exoneration can only take place on an *ad hoc* basis, through the standard of culpability that will need to be established for the imposition of public liability. It can never lead to the recognition of a general principle of public immunity for legislative breaches.

Equally unconvincing is the argument establishing the infallibility of the legislature on the principle of public sovereignty. It will be recalled that one of the most important characteristics of national sovereignty in its modern form is the ability of its holder to determine its exact scope and to impose limits on its exercise. This is exactly what the national governments have done by ratifying the Treaty. This is precisely what they do every time that they consent to its amendment and to

[65] In this respect, see the Opinion of Advocate General Mischo in *Francovich* *op cit* No 12, at point 47. The same argument has been put forward in Germany (for example, see Schlemmer-Schulte and Ukrow 'Haftung des Staates gegenüber dem Marktbürger für gemeinschaftsrechtswidriges Verhalten', (1992) 27 *EuR* 93). Also see the Opinion of Advocate General Tesauro in *Brasserie/Factortame III* *op cit* No 6, at point 37. He argued that the position of the legislature under *Francovich* resembles that of the administrative authorities, when they exercise normative powers in their national legal system.

the adoption of secondary legislation by the political institutions. So long as they continue to form part of this legal system and to contribute to its development, the assumption should be that they express the will of their citizens to subject their legal position to the rights and obligations that the law confers and respectively imposes upon them. Any violation by the domestic authorities of this voluntarily accepted system of rules can thus be interpreted as a breach of the principle of public sovereignty. The imposition of sanctions against any potential wrongdoer appears as nothing more than the product of an implicit legal authorisation provided for by the citizens themselves.

2.2.2.3. Francovich and legislative breaches of a constitutional nature : One delicate question that still remains unanswered concerns the possibility of imposing liability for breaches committed by the constitutional legislature. This is certainly an inconceivable scenario under national law, since there does not exist at domestic level a higher legal parameter against which the legality of constitutional provisions could possibly be assessed.[66] It is becoming apparent that the situation can only be different in the *Francovich* field, if the principle of primacy holds good even with regard to activity of a constitutional nature. It is only in such a case that the courts will have the obligation to examine its compliance with the supremacy requirements and to impose the appropriate sanctions, should this prove not to be the case. Once the obstacle posed by the allegedly absolute supremacy of national constitutional norms is set aside, all the objections against the imposition of judicial control over the activity of the constitutional legislature will receive the same treatment as the one offered with regard to breaches emanating from the existence of inconsistent statutory provisions.

The hierarchical relationship between directly effective provisions and national constitutional law has been resolved by the case law in favour of the former.[67] Specifically with regard to the field of remedies, it has been further declared that the principle of supremacy requires the setting aside of any national

[66] It has been nevertheless argued that the imposition of public liability is feasible, when a constitutional amendment amounts to a breach of the rights of individuals guaranteed by the core constitutional provisions (*Pavlopoulos op cit* No 49, p. 132)
[67] Case 11/70, *Internationale Handelsgesellschaft v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

law obstacle that prevents the effective protection of the rights of individuals. This is so, even when the inconsistent national provision is of a constitutional nature.[68] However, it should not be taken for granted that this jurisprudence has been received well at national level. The courts appear divided on this point. Some have proved rather receptive in this respect.[69] Others have expressed serious reservations towards this direction[70] and have arrived at conclusions that confine the application of the supremacy principle only over provisions of the ordinary legislation.[71]

There are two basic reasons why the courts appear so reserved with regard to the recognition of absolute supremacy over the national constitutional order. The first one relates to their reluctance to renounce the constitutional guarantees directed at the protection of the fundamental human rights of individuals, in the absence of a codified catalogue of such safeguards in the Treaty. It has certainly been established nowadays that fundamental human rights constitute part of the general principles of law and that their beneficiaries are entitled to receive effective judicial protection, in case of their violation.[72] It nevertheless appears that national courts still reserve for themselves the jurisdiction to give precedence to the relevant constitutional guarantees, if they come to the conclusion that the measure of protection offered by the case law does not live up to the one required by their national legal order.[73] They wish to keep a last resort defence against the possible subordination of human rights values to the attainment of the objectives of market and political integration.

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[68] In this respect, see especially Case C-213/89, *R v Secretary of State for Transport, ex parte Factortame Ltd and others* [1990] I CR I-2433.

[69] For example, in *Factortame Ltd v. Secretary of State for Transport* [1991] 1 AC 603 the House of Lords set aside in the light of the principles of supremacy and effectiveness the constitutional law principle that interim relief could not be ordered against statutory legislation. Towards the direction that supremacy operates even with regard to constitutional provisions, see Athens Court of Appeal 9162/92, (1993) 34 *HellDni* 403 and Athens Court of First Instance 2228/92, (1993) 41 *NoB* 328. Also the decision of the Belgian *Conseil d'Etat* in *Henri Orfinger v. Belgium* [2000] 1 CMLR 612.

[70] For example, see the relevant declarations of the Italian Constitutional Court in *Frontini v. Ministero delle Finanze* [1974] 2 CMLR 372 and *Fragd v. Amministrazione delle Finanze* (1989) 72 *RDI* 103. Also the position of the German Constitutional Court (*Bundesverfassungsgericht*) in the first *Solange* case [1974] 2 CMLR 540.

[71] For instance, Greek Council of State (6th Chamber) 2809/97, (1998) 24 *ToS* 943 (noted by Papakonstantinou (1998) 24 *ToS* 977). It was concluded that Article 16 of the Greek Constitution prohibiting the provision of private University education takes precedence over any provision of Community law introducing a different solution. The case was finally decided in plenary session without tackling the issue (Greek Council of State 3457/98, (1998) 24 *ToS* 961).

[72] Since Case 29/69, *Stauder v. City of Ulm* [1969] I CR 419, par. 7. Legislation adopted in contravention of fundamental human rights will be annulled (Case 4/73, *Nold v. Commission* [1974] I CR 491).

[73] Very characteristic in this respect is the decision of the German Constitutional Court in *Re Wünsche Handelsgesellschaft* (*Solange II*) [1987] 3 CMLR 225, at p. 265. It declared that it would no longer review Community legislation by the standard of the constitutionally protected fundamental human rights, so long as the institutions and particularly the Court of Justice ensure the effective protection of these rights. This policy has been recently reaffirmed in *Alcan* (2000) 11 *EuZW* 445 (comment by Hoffmeister (2001) 38 *CMLRev* 791). Also see the Order of the German Federal Constitutional Court, 2 *BvL* 1/97 of 7 June 2000 (2000) 11 *EuZW* 702 (comment by Ehlers and Urban: 'The Order of the German Federal Constitutional Court of 7 June 2000 and the Kompetenz-Kompetenz in the European Judicial System', (2001) 7 *EPL* 21).

The second objection emanates from the fact that many national courts seek the justification for the operation of the principle of supremacy in the specific constitutional provisions that authorise the limitation of national sovereignty and provide the required legal basis for the participation in supranational organisations.[74] The application of this principle with regard to the ordinary legislation is thus often seen as nothing more than the logical consequence of an explicit constitutional authorisation.[75] This reasoning is inapplicable, when the provision that has to be set aside is of a constitutional rank. To allow its challenge, would be to accept that a legal system established on the basis of a concrete constitutional foundation can take precedence over provisions that constitute the source of its validity.[76] If the constitutional legislature had such an intention, it would have said so explicitly. In the absence of such a statement, the subordination of national constitutional law to the supremacy requirements would amount to an indirect constitutional amendment in violation of the strict procedures that have to be followed towards this direction.[77] This argument is not nevertheless irrefutable. Very interesting in this respect is the fairly recent decision of the Belgian *Conseil d'Etat* in *Henri Orfinger*.[78]

The plaintiff was asking for the annulment of a decree which laid down the amended conditions for recruitment in the regional civil service. In an apparent attempt to ensure compliance with the relevant case law on free movement of workers[79], the decree provided that the only administrative posts that could be reserved for home nationals were those entailing direct or indirect involvement in the exercise of public authority and those concerned with the safeguard of the general national interests and the interests of the public authorities. The plaintiff argued that this amendment violated the constitutional provisions. These reserved public office employment only to home nationals, save in special cases provided for

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[74] For example, this is the case with regard to Article 24 of the German Fundamental Law, Article 55 of the French Constitution, Article 11 of the Italian Constitution and Article 28 of the Greek Constitution.

[75] For example, Article 55 of the French Constitution was the legal basis upon which the *Commissaire du Gouvernement* Frydman established in *Raoul Georges Nicolo* (*op cit* No 64) the jurisdiction of the courts to render inapplicable national legislation conflicting with directly effective provisions.

[76] Also see in this direction De Witte 'Community Law and National Constitutional Values', (1991) 18 *LIEI* 1, at p. 4.

[77] Indicatively, see the decision of the Greek Council of State in case 2809/97, *op cit* No 71, par. 21.

[78] *Henri Orfinger*: *op cit*. No 69.

[79] Case 149/79, *Commission v. Belgium* [1980] ECR 3881. It was declared that the employment in the public service exception of Article 39 (4) EC covers only "a series of posts which involve direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities" (par. 10 of the judgment).

by law. He noted that the Treaty was given domestic effect by virtue of a constitutional authorisation and considered that the constitutional requirements prevailed in case of conflict over its provisions. He thus concluded that any changes brought by the decree could only take place after a constitutional revision. In any event, any change to the nationality conditions for employment in the public service could only be brought by statute and not by delegated legislation. The opposite would infringe the relevant constitutional requirements, which prescribe that the introduction of such changes is an exclusive prerogative of the legislature.

The *Conseil d'Etat* dismissed the action. When the Treaty was ratified, there was no apparent incompatibility between its provisions and the national constitutional legislation. The problem arose after the clarification given by the case law as to what should be regarded as employment in the public service.[80] This interpretation had been given by virtue of a concrete constitutional authorisation, that allows the exercise of specific powers to be conferred on public international law bodies. This provision does not determine the powers that can be attributed and it places no limit over them.[81] It also offers the constitutional basis for the institutional mechanisms that the Treaty has established with the particular objective of guaranteeing the uniform interpretation and application of the law.[82] The interpretative authority of the Court is thus based on constitutional foundations. This means that the determinations given by it within the scope of its jurisdiction should prevail, even where this would result in blocking the effects of certain constitutional provisions.[83] This can only change, if the government denounces its membership in the Community or renegotiates the conditions thereof. So long as this is not happening, there is no need to proceed to a constitutional amendment in order to meet mandatory legal requirements.[84] The conclusion is that the contested decree does not create itself the obligation to open up civil service positions. It simply gives effect to an already existing obligation, which is not dependent on any constitutional amendment. The applicant is thus challenging a provision with no autonomous legal

[80] *Henri Orfinger* : *op cit* No 69, par. 5
[81] *Ibid.*, par. 6.
[82] *Ibid.*
[83] *Ibid.*, par. 8.
[84] *Ibid.*, par. 9.

effect and his plea must be dismissed as inadmissible.[85] *Henri Orfinger* offers a very good example of how a constitutional provision authorising the transfer of sovereign power can be interpreted as offering the basis for the operation of the principle of supremacy over the national constitutional provisions.

At a more general level, there does not seem to exist any reason why the respect of the obligations that ensue from the ratification of the Treaty should not be guaranteed with regard also to the constitutional legislature. If the transfer of legislative and political power to supranational entities is indeed nothing more than a further manifestation of public sovereignty, it should not really make much difference whether the source of the illegality complained of by the applicant can be traced in an ordinary stature or the national constitutional provisions. Seen in this perspective, the crucial question for the availability of a *Francovich* action should rather be whether the legal norm allegedly infringed by the legislature has been adopted within the limits of the sovereign rights conferred upon the institutions to effectuate measures expressing the general will. It is interesting in this respect that the national courts seem to be retreating now from the position that they have the competence to examine whether the legislative activity of the political institutions has taken place within the limits of the transfer of sovereignty that has been authorised under their national constitutional legal order. The jurisprudence of the *Bundesverfassungsgericht* provides a very good example towards this direction.

In its *Maastricht* judgment, this court seemed to impose qualifications on the doctrine of supremacy. It made it clear that measures adopted by the institutions in violation of the conditions for the accession of Germany to the Communities would remain with no legally binding force at national level.[86] It also appeared to recognise to itself the power to examine whether these conditions were indeed respected.[87] This position has now been qualified to a considerable extent. The first indications towards this direction were provided for in *Alcan*.[88] The applicant in that case had received an illegal public subsidy. Following the establishment of the violation

[85] *Ibid*., par. 10.
[86] *Brunner v. The European Union Treaty* [1994] 1 CMLR 57, par. 49
[87] *Ibid*., par. 99.
[88] *Alcan* : *op cit*. No 73.

under the public enforcement mechanism[89], the national authorities asked for the repayment of the subsidy. The problem was that the deadline prescribed for that purpose by the domestic legislation had already expired. The issue was finally referred for a preliminary ruling. This clarified that the obligation to repay illegally gained subsidies exists, even when the limitation period provided for by national law has already elapsed.[90] The applicant introduced then a constitutional complaint, arguing that the decision to oblige it to repay the subsidy violated its legitimate expectations. It further considered that the ruling amounted to the creation of new procedural rules and that it should be thus ignored by the national courts, as going beyond the limits of the jurisdiction enjoyed under the preliminary reference procedure. The first part of its complaint was rejected by reference to the *Solange II* jurisprudence. The action was inadmissible, in so far as it failed to show that the protection of fundamental human rights under the Treaty was not satisfactory. It was further held that there can be no question of an *ultra vires* act, when a preliminary ruling simply interprets the law on the facts of a given case. In such circumstances, the danger of giving rise to general procedural rules to the detriment of the domestic arrangements on the matter does not actually arise.

Further proof in this respect has been furnished following a subsequent order of the *Bundesverfassungsgericht*.[91] The court was called upon to rule on whether Regulation 404/93[92] is compatible with the domestic constitutional provisions and to clarify whether the national laws ratifying the Treaty should be interpreted as prohibiting the enforcement of the specific measure in the domestic legal order. The case was not examined on its merits, since the relevant request was held inadmissible. The court avoided to make any reference to its earlier *ultra vires* doctrine and declared that actions directed towards the disapplication of acts adopted by the institutions can only be examined, if they allege a violation of the constitutionally protected fundamental rights and show in detail that the protection of those rights under the Treaty does not live up to the requirements of the

[89] Case 94/87, *Commission v. Germany* [1989] ECR 175.
[90] Case C-24/95, *Land Rheinland-Pfalz v. Alcan Deutschland GmbH* [1997] ECR I-1591
[91] Order of 7 June 2000, with comment from Ehlers and Urban *op cit.* No 73
[92] Council Regulation 404/93/EC of 13 February 1993 on the common organisation of the market in bananas (OJ 1993, L47/1)

respective national constitutional provisions. This statement amounts to a complete recognition of the principle of supremacy over national constitutional law, subject to the reservation that the protection offered to the fundamental rights of individuals remains adequate.[93] Once the stumbling block of the constitutional supremacy is set aside, the road towards the imposition of *Francovich* liability for breaches committed by the constitutional legislature is becoming much more accessible.

2.2.3. The unsettled question : State liability for breaches committed by the national judiciary[94] : No case has been decided yet under the preliminary reference procedure concerning a violation committed by the national judiciary. There are important questions to be dealt with in this respect. In the first place, it has to be determined whether it was also intended to make *Francovich* available in respect of judicial breaches. The violation in such circumstances may consist in a blatant failure to apply the doctrines developed for the judicial enforcement of the law, an omission to make a preliminary reference or even a simple misinterpretation and misapplication of the legal provisions involved in a given litigation.[95] There is also the need to ascertain the extent to which there actually exist the theoretical foundations for the recognition of the liability of the State in its judicial capacity, despite the particular status that the courts enjoy in their national legal orders and the sensitive nature of the functions that they perform. Finally, it has to be examined whether such a material extension of the *Francovich* principle would constitute indeed a politically wise and practically workable solution. There are many particular considerations that have to be taken into account in this direction, when reproaching the national courts for violating their legal obligations.

2.2.3.1. The indications from the case law of the Court : It will be recalled that the only question asked under *Francovich* is whether a given breach emanates

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[93] This decision is criticised by Schmid : 'All Bark and No Bite', (2001) 7 *ELJ* 95

[94] Also see Anagnostaras : 'The principle of State liability for judicial breaches : The impact of European Union law' (2001) 7 *EPL* 281.

[95] On the forms that a judicial breach may take, see Toner : 'Thinking the Unthinkable ? State Liability for Judicial Acts after Factortame III', (1997) 17 *YEL* 165, pp 183-186. Specifically on the failure to make a reference, see Ter Kuile : 'To Refer or not to Refer : About the Last Paragraph of Article 177 of the EC Treaty', in Curtin/Heukels (eds.) *Institutional Dynamics of European Integration. Essays in Honour of Henry Schermers*, Nijhoff Publishers 1994, pp 381-389. Also see Lenaerts and Arts : *Procedural Law of the European Union*, Sweet & Maxwell 1999, p. 53

indeed from a public authority. The internal allocation of powers and the position held by the wrongdoer in the national legal order are absolutely irrelevant for the admissibility of the relevant damages claim. Liability thus arises whatever be the organ whose act or omission was responsible for the breach.[96] Given that the judiciary constitutes one of the three branches of government, the implication seems to be that its activities do not escape the application of the doctrine.[97] The Court has not been asked so far to pronounce directly on this point. Notwithstanding this fact, it did find the opportunity to declare *obiter* that the courts form indeed part of this unitary conception of the State.[98]

It is also important to recall that the *Francovich* principle has been introduced with a dual objective in mind, namely the enhancement of the effectiveness of the law and the effective protection of the rights that the latter intends to confer upon individuals. There is little doubt that the violation by the judiciary of the duties entrusted to it may seriously undermine the attainment of both these objectives.[99] Furthermore, the obligation to make good the damages that the illegal public activity may cause to individuals has been established on the basis of the fidelity clause of Article 10 ECT.[100] This provision imposes upon all the national authorities the duty to comply with the requirements of the primary and secondary legislation and entrusts the national judiciary with the task of applying and enforcing all legally binding rules.[101] There do not thus seem to exist any grounds to assume that the doctrine intends to treat the wrongdoer in a more favourable way when acting in its judicial capacity than when operating in the legislative and administrative area, given the identity of the interests at stake in all three scenarios. On the contrary, it would be entirely consistent with the pronouncements made in this respect to argue that any obstacles posed by the national legal systems towards the imposition of public liability for judicial breaches should be set aside in order to give way to the effectiveness requirements.

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[96] *Brasserie/Factortame III*: *op cit*. No 6, par. 32.

[97] Toner: *op cit*. No 95, Steiner: 'The Limits of State Liability for Breach of European Community Law', (1998) 4 *EPL* 69, at pp. 91-92, Szyszczak: 'European Community Law: New Remedies, New Directions?', (1992) 55 *MLR* 690, at pp. 696-697, Craig: 'Once more unto the breach: The Community, the State and damages liability', (1997) 113 *LQR* 67, at p. 71.

[98] *Brasserie/Factortame III*: *op cit*. No 6, par. 34. Also see Léger AG in *Hedley Lomas*: *op cit*. No 11, at point 114.

[99] *Francovich*: *op cit*. No 12, par. 33.

[100] *Ibid*., par. 36.

[101] For example, Case 14/83, *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891, par. 26.

That the law does not distinguish between breaches attributed to the judiciary and the other national authorities is further shown from the experience under the public enforcement mechanism. No case involving a judicial infringement has actually been decided so far in the context of such an enforcement action. However, it has already been declared that the State can be held responsible even for violations committed by constitutionally independent institutions.[102] Most academics agree that this statement is wide enough to embrace also breaches emanating from the national courts.[103] The reason why there has not been an opportunity so far to rule on this specific point is probably due to the fact that the suitability of the use of the public enforcement mechanism with regard to judicial infringements is highly contested. The Commission refrains from initiating the relevant proceedings on the basis of political considerations.[104] This is not to say that it excludes such a possibility as a matter of principle. It has in fact affirmed repeatedly its jurisdiction to initiate the relevant procedure, should it feel that the judicial violation concerned is of such a gravity as to require its drastic intervention through an enforcement action.[105] It has even on certain occasions commenced infringement proceedings without finally pursuing them.[106] Policy reasons left aside, it seems thus to make little difference in this area whether a given violation emanates from a political or a judicial domestic authority. It could be consequently imagined that a similar approach on this point may be followed also with regard to the imposition of *Francovich* liability.

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[102] For example, Case 77/69, *Commission v Belgium* [1970] ECR 237, par. 15 and *Commission v Italy*, *op cit* No 13, par. 14.

[103] Hartley: *The Foundations of European Community Law*, 4th edition, OUP 1998, p. 299, Pescatore: 'Responsabilité des Etats Membres en cas de manquement aux règles communautaires' (1972) *Il Foro Padano* 12, Cahiers 'Les Articles 169 et 171 du Traité instituant la CEE à travers la pratique de la Commission et la jurisprudence de la Cour', (1974) 10 *CDE* 3, p. 7. In this respect, also see the Opinion of Advocate General Warner in Case 9/75, *Meyer-Burckhardt v Commission* [1975] ECR 1171, at p. 1187. He argued that an enforcement action is possible, when a national court of last instance violates its obligation to make a preliminary reference.

[104] See the answers given by the Commission to written questions 100/67 (OJ 1967, 276/12), 28/68 (OJ 1968, C71/1), 349/69 (OJ 1970, C20/4), 414/74 (OJ 1975, C54/1) 23/75 (OJ 1975, C161/11) and 608/78 (OJ 1979, C28/8).

[105] *Ibid*. The Commission complained to the German and French Governments after the decisions of the *Bundesverfassungsgericht* and the *Conseil d'Etat* in *Internationale Handelsgesellschaft mbH v Einfuhr-und Vorratsstelle für Getreide und Futtermittel* [1972] CMLR 177 and *Minister of the Interior v Cohn-Bendit* [1980] 1 CMLR 543 respectively. However, proceedings were never formally brought. Also see Working Document 94/69 of the European Parliament, with regard to the application of the public enforcement mechanism against infringements of Article 234 ECT.

[106] In its Seventh Report to the European Parliament on the application of Community law, the Commission reports the initiation of infringement proceedings against France for a judgment of the *Cour de Cassation* upholding the ruling of a lower court that violated the Community law rules (OJ 1990, C232/54). In its answer to written question 1907/85, the Commission declared its intention to initiate the Article 226 ECT mechanism against Germany for a violation committed by the Federal Fiscal Court (OJ 1986, C137/7). Neither of the above cases was brought to the Court, since the issues were resolved extra-judicially.

2.2.3.2. The theoretical foundations for the imposition of liability on the State *qua* judicature : The theoretical and legal foundations upon which liability for judicial breaches will be based remain extremely controversial and contested. There does not seem to exist a uniformity of solutions in the national legal orders. Some countries exclude completely the possibility of individuals receiving any kind of compensation from the public funds for infringements committed by the courts.[107] Certain others are more receptive in this respect, but the conditions that have to be met in order for the relevant damages action to succeed are usually very stringent.[108] The best example is probably given by Belgium. When the loss emanates directly from a faulty judgment, it is necessary to show that the act in question has been removed, amended, annulled or withdrawn by a decision which has the authority of *res judicata*.[109] In Germany, the liability of the judges can only arise when their violation constitutes a criminal act and it is not clear under which circumstances damages can be sought from the national treasury.[110] In France, the applicant must prove a serious breach or a denial of justice and it is still contested whether liability can be imposed with regard to judgments that have already become definitive.[111] A similar burden of proof is required in Italy, where the imposition of public liability is possible only with regard to breaches that do not constitute criminal acts.[112]

Even when the language of the respective provisions on public liability seems wide enough to embrace breaches attributed to the judiciary, there is often diversity between doctrine and jurisprudence as to whether there exists indeed the legal basis for bringing damages actions with regard to violations committed by the courts.[113] In practice, it is only exceptionally that the payment of compensation from

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[107] This is the case in the UK, by virtue of section 2 (5) of the Crown Proceedings Act. The same seems to hold true in The Netherlands (Kortmann : 'Note à propos de l'arrêt de la Cour de Cassation en date du 19 Décembre 1991', (1994) 2 *ERPL* 115)

[108] For example, France (Article 11 of the *Code d'organisation judiciaire* with regard to civil and criminal courts and the principles introduced in *Darmont* [1978] *Rec. Lebon* 542 as concerns the administrative courts) and Italy (Law no 117 of 13 April 1988, GURI No 88 of 15 April 1988). It is reported by Bengtsson : 'Governmental liability for faulty judgments ?', (1994) 2 *ERPL* 113 that State liability for judicial breaches is also accepted in the Scandinavian countries

[109] *De Keyser (Anca) v Ministre de la Justice*, (1992) 111 *JT* 143. Also see Picardi : 'La responsabilité de l'Etat du fait de la fonction jurisdictionelle en droit belge', (1994) 2 *ERPL* 130

[110] Article 839(2) of the Civil Code

[111] Cadiet: (1994) 2 *ERPL* 121, Dany : *op cit.* No 43, pp. 245-247, Van Compernolle and Glousot-Marchal : 'La responsabilité du fait des actes du service public de la justice : éléments de droit comparé et perspectives de "lege ferenda"', in *La Responsabilité des Pouvoirs Publics*, Bruylant 1991, pp. 413-438

[112] Orariadet and Mattei : 'Judicial Responsibility in Italy : a New Statute', (1990) 38 *AJCL* 103, Van Compernolle and Glousot-Marchal : *ibid*

[113] This is the case in Greece. For example, see Athens Court of Appeal 6044/79, (1980) 28 *NoB* 308 and 6772/87, (1987) 35 *NoB* 1630. They both deny the payment of damages from the public funds for judicial violations

the national treasury will be ordered for loss sustained due to the infringement by the judges of their domestic law obligations. It is primarily with regard to international law and the protection of human rights that such a liability has been clearly established.[114]

There are various kinds of reservations expressed against the recognition of the obligation to make good from the public funds the loss arising from the unlawful activity of the courts. The notion of public sovereignty, the wish to prevent the imposition of an extra pressure on the shoulders of the judges and to protect the public treasury, the principle of judicial independence, the need to prevent the indirect challenge of already decided issues and the principle of *res judicata* constitute the basic objections towards this direction.[115] It is nevertheless submitted that none of them offers any convincing explanation why the national treasury should remain totally immune from damages suits alleging a given judicial illegality and why individuals should be expected to bear themselves the financial consequences that a violation by the courts of the rights that the law intended to confer upon them may possibly entail.

a) The principle of public sovereignty : The establishment of the immunity of the State for breaches committed by the national judiciary was originally attempted on the basis of the familiar dogma of the absolute public sovereignty. The exercise of judicial power was seen as a manifestation of this sovereignty, the unconditional nature of which ruled out any possibility that a damages action could ever be available with regard to the way that the judges would choose to perform the duties entrusted to them. However, the modern legal theory established progressively that all public authorities operate within a predetermined legal framework which obliges

[114] For example, see the UN International Law Commission Draft Articles on State Responsibility. Also see Olowofoyeku : 'State Liability for the Exercise of Judicial Power', [1998] 43 *PL* 444, pp. 460-461 for a list of cases where the ECtHR ordered the payment of damages under Article 50 ECHR for the breach by the courts of Article 6 (1) of the Convention

[115] Advocate General Velu categorised in *De Keyser* in three groups the arguments against the imposition of public liability for breaches attributed to the judiciary. He distinguishes between those based on the independence of the judicial power and the principle of separation of powers, those based on the principle of *res judicata* and those based on the theory of the organ Picardi (*op cit* No 109, p. 132), makes a distinction between arguments drawn from the particular organisation of justice (judicial independence, absence of collaboration between the parties, risk of conflict between the parties, voluntary character of recourse to justice and danger of the imposition of an extra financial burden on the State) and arguments based on the nature itself of the jurisdictional function (inclusion of the judiciary amongst the sovereign functions and the authority of *res judicata*) Also see Dany : 'La responsabilité de l'Etat pour faute du pouvoir judiciaire' in *La Responsabilité des Pouvoirs Publics*, Bruylant 1991, pp. 363-382, at pp 365-371 and Tower *op cit* No 95, pp 173-176

them to comply with the rule of law and the principle of legality.[116] As a result, the doctrine of the sovereign judicature ceased to constitute a convincing theoretical foundation for the recognition of the absolute immunity of the State in its judicial capacity.

b) The imposition of an extra pressure on the shoulders of the judges and the need to protect the national treasury : The second category of arguments focuses primarily on the effects that the imposition of public liability for breaches attributed to the judiciary would have for the performance by the national courts of their judicial duties. It is argued that even the mere prospect of their actions giving rise to damages actions for the receipt of compensation from the public funds may impose a further pressure on the shoulders of the judges and thus inhibit their judicial activity. The wish to protect the performance of the judicial tasks clearly constitutes one of the basic reasons why the imposition of personal and direct judicial liability is considered as inconceivable in the vast majority of the modern legal systems. It should be nevertheless doubted whether such fears are indeed justified when liability is not imposed personally on the judges but rather on the legal person of the State, in the institutional framework of which the judiciary is included.

The only reservation that has to be kept in this respect concerns the possibility of the State being allowed to turn subsequently against the court responsible for the breach and to recoup everything that it was obliged to pay to the affected individuals.[117] This could impose indirectly an extra pressure on the national judges and thus inhibit the performance of their judicial duties. This is a delicate point that may give rise to much controversy, depending on the way it is treated by each domestic legal system. With regard to *Francovich* breaches, it seems that the determination of the matter is entrusted almost exclusively to the national legal orders. The latter are given the latitude to make reparation for the consequences of the loss caused by the illegal activity of their public authorities in accordance with the domestic rules on liability, provided that the applicable

[116] *Supra* 2.2.1.

[117] Van Compernolle and Closset-Marchal : *op cit.* No 111, p 437 characterise the availability of a recoupment action as necessary and dangerous at the same time. Also see Toner *op cit* No 95, p 174 and Ebmy *op cit* No 115, p 366

conditions are not less favourable than those relating to similar domestic claims and are not such as to make it impossible or excessively difficult in practice to obtain damages.[118] This is nothing more than the application in the *Francovich* field of the familiar principle of national procedural autonomy.[119]

In the same direction, it is sometimes argued that the recognition of a principle of public liability for judicial breaches would give rise to an avalanche of damages actions overburdening the already excessive workload of the courts and thus distracting them from the performance of the rest of their duties. The existence of a torrent of public liability actions would also endanger the financial interests of the national treasury and thus those of the community as a whole.[120] Given that the courts are entrusted with the task of resolving controversial legal disputes and interpreting vague and often unclear legal rules and principles, such a danger could indeed arise if it was accepted that any kind of judicial fault could open the way to the initiation of a damages action. However, such concerns can be eased considerably by requiring the existence of a certain degree of gravity in the judicial fault that gave rise to the loss of the applicant. Indeed, it would seem unjustified to impose liability in any case that a judgment is merely wrong and has been possibly quashed on appeal. It is to be expected that the sufficiently serious breach requirement that applies in the *Francovich* field could operate successfully in this direction. After all, the nature itself of the damages action and the cost and trouble involved in seeking a remedy from the public funds will probably operate in practice as a strong deterrent against claims that are not based upon firm legal foundations.[121] This reduces considerably the danger of the courts being distracted from the performance of their judicial duties by an avalanche of liability proceedings brought against the State *qua* judiciary.

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[118] *Brasserie/Factortame III* : *op cit.* No 6, par. 67.

[119] *Supra* 0.2. That this principle applies in the field of State liability was made clear since *Francovich* itself (par. 42-43 of the judgment). In this direction, also see Cases C-94 & 95/95, *Bonifaci and Berto v INPS* [1997] ECR I-3969, Case C-261/95, *Palmisani v. INPS* [1997] ECR I-4025 and Case C-373/95, *Maso & Gazzetta v INPS* [1997] ECR I-4051.

[120] Bonnard : *De la responsabilité civile des personnes publiques et de leurs agents en Angleterre, aux Etats Unis et en Allemagne*, 1914 argued that this constituted the basic reason for the establishment of State immunity for judicial breaches.

[121] Toner : *op cit.* No 95, p. 175.

c) The principle of judicial independence : One of the most powerful objections to the extension of the application of the principle of public liability to the judicial field concentrates on the particular status that the national courts hold in the domestic legal order and the independence that their members enjoy in the performance of their duties. The relevant argument operates in two directions. Imposing governmental liability for breaches committed by the judges would seem to imply that there is a close link between the judicial and the political authorities, in contravention of the constitutional guarantees establishing the independence of the judiciary.[122] At the same time, the State would be held liable for the activity of bodies over which it does not have the power to exercise any control at all.[123] Similar arguments based on the constitutional independence enjoyed by certain domestic authorities have not been particularly successful in the field of enforcement actions.[124] However, it is necessary to ascertain the extent to which they may be justified with regard to the courts and the possibility of their activity giving rise to public liability claims.

With regard to the first part of this argument, it should be noted that the constitutionally protected judicial independence has been introduced with the purpose of guaranteeing the impartial performance by the courts of the duties entrusted to them. It aims at shielding the judges from any interference emanating from either the legislature or the executive.[125] The need to protect the freedom that the judges should enjoy in the exercise of their judicial functions also explains why the imposition of personal liability for faulty judgments is often seen as an unsuitable means of restoring the loss that individuals may have sustained because of them. It does not equally explain why this should be the same, when the action for damages is brought against the State.[126] What is established in such a case is not the

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[122] Wooldridge and D'Sa : 'ECJ decides factortame (No 3) and Brasserie du Pêcheur', (1996) 7 *ELRev* 161, p. 163, Szyszczak *op cit.* No 97, p. 696, Steiner : 'From direct effects to Francovich : shifting means of enforcement of EC law', (1993) 18 *ELRev* 3, p. 11, footnote No 48, Steiner *op cit* No 97, p 91 Also the report of M Merchiers (Working Document 94/69 of the European Parliament) He stated, with regard to the prospects of bringing an enforcement action for judicial breaches, that "l'utilisation éventuelle de l'article 169 se heurterait naturellement à l'independence du pouvoir judiciaire vis-à-vis du pouvoir exécutif".

[123] Wooldridge and D'Sa : *ibid*

[124] Indicatively in this respect, see the relevant pronouncements in *Commission v Italy* *op cit* No 15, par 14 and *Commission v Belgium* *op cit.* No 102, par. 15.

[125] Very convincingly in this direction, Pavlopoulos : *op cit.* No 49, pp. 175-176 In this respect, also see Pavlopoulos and Alevizatos : 'Commentaire d'arrêt Cass Belge, 19/12/91', (1994) 2 *ERPL* 136, p. 139

[126] *Ibid*

interference of the political branches of government with the functions entrusted to the judiciary, contrary to the principle of judicial independence, but rather the obligation to make good the loss arising from the activity of public organs that have been given immunity from the institution of liability claims directly against them. It should be nevertheless emphasised that the recognition to the State of a recoupment action against the court responsible for the breach might give rise to serious concerns in this respect, to the extent that it could be used as an indirect means of exercising political pressure on the judiciary in contravention of the relevant constitutional guarantees.[127]

However, the fact that the imposition of public liability does not interfere with the way that the courts will choose to perform their functions carries with it another important consequence. It should be recalled that liability rules usually perform a dual function, a reparatory and a dissuasive one. It is not nevertheless clear how exactly the payment of damages from the public funds is supposed to affect the conduct of the judicial authorities, given the independence that the latter enjoy from any kind of governmental control over the performance of their duties.[128] It could be certainly argued that the prospect of their activities affecting the national treasury, and thus the financial interests of the community as a whole, could have the potential effect of making the courts more responsible in the exercise of their judicial functions. However, there does not exist conclusive proof towards this direction. The justification for the imposition of governmental liability for judicial breaches lies thus principally in the need to cure the injustice that would occur, if specific individuals had to bear themselves the costs of the defective exercise of a function operating in the pursuit of the general good, and not so much in the deterrent effect that such a liability principle could actually produce. This being so, the imposition of limitations on the obligation to pay damages from the national treasury for judicial breaches could be possibly accepted more easily than with regard to other types of public liability.

[127] In this direction, Van Compernolle and Closset-Marchal *op cit* No 111, p 437

[128] In this respect, see Lee : 'In Search of a Theory of State Liability in the European Union', *Harvard Jean Monnet Working Paper* 9/99 p. 37.

The second part of the judicial independence argument focuses on the unfair results that the imposition of governmental liability for the illegal activity of the constitutionally independent courts would entail for the central administration. More specifically, it is argued that it sounds rather peculiar to order the payment of damages for a breach that the defendant did not have any means of avoiding or even possibly any knowledge of its existence. Perhaps, the theoretical foundation for the justification of such a development can be found in the notion of sovereignty.[129] Indeed, the exercise by the judiciary of the duties entrusted to it has been authorised by the State and thus constitutes one more manifestation of the sovereign nature of the latter. If the exercise by the courts of this sovereign power exceeds the limits within which it should operate, it should be for the society as a whole to guarantee that the affected individuals will receive an effective remedy. This should be so, regardless of the fact that the political power has consented to abstain from any control on the way that the judges will choose to perform the tasks that it has entrusted to them and has further subjected their activity to such constitutional guarantees as to preclude the possibility of individuals bringing a direct damages action against them. After all, it is difficult to accept that the need to guarantee the impartial performance of the judicial functions can lead to a lacuna in the system of protection of the rights of individuals.

d) The principle of res judicata and the need to prevent the indirect challenge of already decided issues : Allowing damages suits for the recovery of the loss sustained by judicial activity is often seen as an indirect means of putting again under examination an already decided legal issue, in the sense that it obliges the judges hearing the liability action to ascertain whether a court has decided correctly a given substantive issue. The objection in this respect is threefold. Firstly, it seems to be disregarded that it is in the clear interest of justice to bring all legal disputes to a definite end and to avoid the disturbance of legal peace and certainty that the indirect challenge of already decided issues entails. Secondly, such a development would clearly infringe the principle of *res judicata* and undermine the objectives

[129] In this respect, Olowofoyeku : *op cit.* No 114, p 451.

pursued by it. Finally, the internal judicial hierarchy might be offended. Indeed, the inferior courts would be empowered to contest indirectly the legality of the conduct even of courts that hold a superior position in the national judicial pyramid.

The argument focusing on the finality of litigation and the need to prevent the indirect challenge of already decided issues is undoubtedly powerful. There is no problem in this respect, when the illegality of the judicial conduct that constitutes the basis of the relevant damages action has been established definitely by a court sitting at the top of the domestic judicial pyramid. In such a case, the reinstatement of the plaintiff to the financial position that he would have been in, had the violation not taken place, does not run counter to the need to terminate the judicial uncertainty but constitutes the corollary of the restored substantive legality. On the other hand, the admissibility of such a damages claim ought not be accepted with regard to judicial acts that are still open to appeal before a superior court by either of the parties involved in a given legal dispute. When any detriment suffered can be remedied by quashing the act that allegedly violates the legal position of the plaintiff, it would hardly serve the interests of justice and legal certainty to open a parallel round of litigation in the course of which it would be necessary to examine indirectly the validity of a judicial conduct that can still constitute or already constitutes the subject-matter of a direct challenge before another national court.

Much more controversy exists with regard to damages actions brought on the basis of allegedly unlawful judicial acts attributed the authority of *res judicata*, the legality of which can no longer be contested directly at a higher level. In such a case, the recognition of a damages action against the State would amount to an indirect challenge of the validity of a judicial decision that has already become definitive. When the allegedly unlawful judicial act has become definitive due to the failure of the plaintiff to contest it in time before a higher court, the mitigation principle can be put forward to bar the admissibility of the relevant damages action.[130] The problem arises primarily, when *res judicata* has been produced through the exhaustion by the applicant of all available legal means.

[130] The argument being that the plaintiff failed to show the necessary diligence to prevent his loss from arising or increasing

The principle of *res judicata* serves a very important public interest, especially in respect of the legal certainty that should exist in the operation of justice. It should be nevertheless accepted that the ultimate goal remains always the correct administration of justice and not the termination under any cost of the uncertainty, that the prolongation of the judicial process is possibly giving rise to. Judicial certainty and peace has to be balanced against competing legal principles, especially that of effective judicial protection. The question thus remains whether individuals should be left entirely unprotected in those exceptional cases, where a judicial act that has already become definitive would appear to compromise arbitrarily the rights that the law intended to confer upon them. This should be especially so in the *Francovich* field. It is indeed well documented in this respect the reluctance of certain national courts of last instance both to comply with very unambiguous obligations imposed upon them and to apply principles of fundamental importance introduced by the case law.[131]

Serious concerns arise with regard to the second strand of the indirect challenge argument. According to it, the imposition of public liability for breaches committed by the national judiciary would offend the domestic judicial hierarchy by granting to the judges the jurisdiction to challenge indirectly the validity of the solutions given by courts superior to them. This is so, because the relevant complaint will often concern the conduct of a court operating at a level higher than the one that the damages action has to be brought in. Superior courts are composed of more experienced and tested judges and are thus expected to be better equipped to resolve successfully a given legal dispute. The question is thus whether it would be indeed justifiable to recognise to the judges the power to declare that the conduct of their hierarchically superior court was mistaken and to order the payment of damages to those suffering loss because of it.

This is indeed a very powerful argument. However, there are several points that have to be taken into consideration. Even when the case is originally heard by a court hierarchically inferior to the one the conduct of which has given rise to the

[131] The most vivid example in this respect is given by the jurisprudence of the *Conseil d'Etat*, which continues to follow its famous *Cohn-Bendit* case law (*op cit.* No 105) and to declare that Directives cannot be invoked directly against an individual legal act.

relevant damages action, its decision will usually have to go through the normal judicial route provided for by the domestic legal order before it can finally become definitive. The construction itself of the national legal systems provides therefore sufficient guarantees that the case will be heard eventually by a court holding in the domestic judicial pyramid a position at least comparable to the one held by the court, the activity of which constitutes the basis of the respective public liability action. If the need to ensure the respect of the domestic judicial hierarchy indeed requires it, nothing further prevents the national legal orders from subjecting the liability actions brought against the State in its judicial capacity to a special court comprised of members having the necessary experience and status to pronounce authoritatively on the legality of the indirectly contested judicial act. Finally, certain particular considerations come into play when *Francovich* is involved. In this area, the national judges are not left on their own to determine whether a judicial violation has actually taken place but they are rather assisted by a continuously expanding case law. They are also always entitled to ask for further clarification under the preliminary reference procedure on whether a certain conduct constitutes indeed an infringement, that should give rise to the payment of damages from the national treasury to the suffering individuals. Not even this assistance will be necessary in those cases, where the existence of a judicial breach is evident. This will be especially so, when the infringement consists not in the failure to interpret and apply correctly certain ambiguous and widely drafted legal norms but rather in the violation of a number of concrete and precise obligations that the law imposes upon the national courts.[132]

2.2.3.3. Practical problems and concerns connected with the extension of Francovich to judicial breaches : The conclusion reached thus far is that none of the arguments usually put forward to justify the immunity of the State in its judicial capacity seems to be irrefutable. However, what is desirable and theoretically possible is not always practically feasible or politically acceptable. Indeed, the

[132] Suffice it to refer here to the violation of the obligation to make a preliminary reference under Article 234 (3) ECT or to apply the principles developed for the judicial enforcement of the law, such as those of direct effect, consistent interpretation and *Francovich* itself.

practical effectiveness of the introduction of a principle of public liability for judicial breaches can be seriously doubted. Furthermore, it could even be argued that it would give rise to more problems than the ones that it would actually resolve. One of the main weaknesses of any system providing for the payment of damages for judicial activity lies in the fact that it entrusts inevitably the determination of the breach to a body belonging in the same system as the wrongdoer. Both the judge and the wrongdoer constitute part of the national judiciary. This may undermine the chances of receiving redress, especially when the violation has been committed by a court holding a high position in the national judicial pyramid. This is not only because the judge who will be called upon to determine the existence of such a breach may hesitate to reproach the activity of such a superior court. It is also because the case may reach on appeal the actual body accused of having committed the infringement complained of by the plaintiff.[133] It is thus to be wondered how it will be possible to guarantee the impartiality of this court, even if it is composed of different judges than the ones involved in the contested judgment.[134] It is further asked whether there is any point at all in accepting the availability of a damages suit in circumstances permitting to the alleged wrongdoer simply to confirm the legality of its contested action and to dismiss the relevant claim.

Furthermore, the imposition of governmental liability for breaches committed by the courts might have serious political implications for the domestic judicial orders and could potentially undermine the relationship between courts belonging in different judicial pyramids within the same legal system. This can be especially so in countries with more than one court systems.[135] This is because the bodies having the jurisdiction under national law to hear public liability actions may be called upon at some point to determine indirectly the legality of the conduct of

[133] Consider the case where the violation concerns the failure of the last instance court to refer a question under the preliminary ruling procedure. The damages action reaches on appeal this same court, which is now called upon to reproach itself for the infringement of its relevant obligation. In this respect, D'Sa : *EC Law and Remedies in England and Wales*, Sweet & Maxwell 1994, p. 165.

[134] A question also posed by Toner : *op cit.* No 95, p. 187. Also see Léger AG in Case C-185/95, *Baustahlgewebe GmbH v. Commission* [1998] ECR I-8417, at points 66-71. He argued that the CFI should not have the jurisdiction to decide actions for damages directed against its own judgments, since its impartiality under such circumstances is questionable.

[135] For example, in France and Greece there is a distinction between ordinary and administrative courts. The former are basically dealing with civil and criminal matters, while the latter have the jurisdiction to decide all public liability actions. At the top of the ordinary judicial pyramid, the French and the Greek legal orders have placed respectively the *Cour de Cassation* and the *Areios Pagos*. The supreme position amongst the administrative courts is held by the *Conseil d'Etat* and its Greek equivalent, the *Symvouleio tis Epikrateias*.

judges belonging to a different judicial pyramid. Especially if the relevant litigation involves from the position of the judge and the wrongdoer two courts sitting at the top of the judicial system that they belong to, the whole dispute may easily turn into a battle over jurisdiction and be translated into a struggle for the conquest of the supreme position in the domestic judicial order.[136]

Special considerations apply, when the judicial violation takes place in the *Francovich* sphere. The argument is put forward that reproaching the judges for the violation of their legal obligations might compromise their fruitful collaboration with the Court.[137] This is probably the most important reason behind the reluctance to initiate enforcement proceedings for breaches committed by the national courts, even when it is absolutely clear that the attainment of the objectives pursued by the law is seriously undermined.[138] There is certainly a difference between liability suits and actions brought under the public enforcement mechanism, to the extent that a damages claim does not involve the same degree of direct involvement by the political and judicial institutions as an enforcement action. It is not the Commission that has to ask for the conviction of the defendant for a violation committed by its national courts and it will not be the Court that will establish the existence of the judicial breach and order the payment of compensation to the individuals affected by it. It is not nevertheless possible to predict what the reaction of the national judges might be, if *Francovich* appeared to question their willingness and ability to comply with the duties entrusted to them without operating under the constant threat of their activity giving rise to the initiation of liability actions for the receipt of monetary compensation from the public funds.

Despite the politically sensitive nature of the matter, the Court may be called upon at some point to rule directly on the application of *Francovich* with regard to

[136] Consider the scenario where the *Cour de Cassation* has failed to refer a case under the preliminary ruling procedure on the basis of the *acte clair* doctrine. One of the litigants in that case brings a *Francovich* action in the administrative courts, claiming compensation for the loss that this alleged violation has caused to him. The case reaches on appeal the *Conseil d'Etat*, which has to decide whether the failure of the *Cour de Cassation* to refer can be indeed justified on the basis of the *acte clair* doctrine and whether, in case of a negative answer, the conditions are met to order the payment of damages from the public treasury for the unlawful activity of one of the national courts. The tensions that such a litigation may give rise to with regard to the relationship between the *Cour de Cassation* and the *Conseil d'Etat* are obvious.

[137] Toner : *op cit.* No 95, pp. 181-182, Steiner : *op cit.* No 97, pp. 91-92.

[138] When the Commission was asked whether it was considering the initiation of proceedings against France for the failure to accept in the *Semoules* case [1970] CMLR 395 the operation of the principle of supremacy over subsequently adopted national norms, it declared that "la mise en oeuvre de la procédure prévue à l'article 169 du traité CEE ne doit pas être envisagée dans tous les cas où une décision d'une juridiction nationale méconnaît la portée du droit communautaire" (JO 1970, C20/5).

breaches committed by the national judiciary. The action for damages is brought by individuals, who are motivated not by political considerations but rather by the wish to receive redress for the loss that they have sustained due to the unlawful activity of the domestic authorities. It will not be nevertheless surprising, if an attempt is made in such a case to circumvent the problem by imposing public liability without identifying the judiciary as the source of the breach giving rise to the damages claim. Given that in the majority of the cases it is possible to link the loss of the plaintiff with the activity of more than one national authorities, it might prove much more convenient and politically acceptable to attribute the breach to the executive and the legislature for applying inconsistent national legislation and for failing to adopt the necessary measures to ensure compliance with the legal obligations imposed upon them.[139] To allow this to happen would be in perfect harmony with the principle of national procedural autonomy and the freedom of action that the latter is leaving to the national legal orders to provide effective judicial protection in the way that they consider as more suited to their respective domestic arrangements.[140] The indications on this point from the *Francovich* case law are that it makes little difference the capacity in which the defendant is sued[141] and the precise form that the reparation takes[142], so long as adequate protection is somehow offered to the applicant. It is to be expected that a similar approach will be followed also with regard to violations that can be attributed to the national courts.

2.3. The vertical dimension of the State in public liability actions : The discussion has so far centred around the horizontal capacity in which the State can be held liable in the payment of compensation to individuals. This does not provide of itself an answer as to what should be understood by the notion of the public administration for the purposes of *Francovich*. A comparative examination of the

[139] In this respect, Szyszczak : *op cit.* No 97, p. 697. A similar position is put forward by Toner : *op cit.* No 95, p. 184. She proposes the attribution of the breach to the executive or the legislature for failing to amend the law.
[140] *Supra*, 0.2.
[141] *Infra* 2.4.
[142] *Bonifaci & Berto* : *op cit.* No 119, *Palmisani* : *op cit.* No 119, *Maso & Gazzetta* : *op cit.* No 119, Case C-131/97, *Carbonari and others v. Università degli Studi di Bologna, Ministero della Sanità, Ministero dell'Università e della Ricerca Scientifica, Ministero del Tesoro* [1999] ECR I-1103. Also Anagnostaras : 'State liability v Retroactive application of belated implementing measures : Seeking the optimum means in terms of effectiveness of EC law', [2000] 1 *Web JCLI* and Dougan : 'The Francovich Right to Reparation : Reshaping the Contours of Community Remedial Competence', (2000) 6 *EPL* 103, p. 111. Also *supra* 1.5.

various national legal systems shows that this concept is interpreted rather broadly. It comprises thus both the totality of the domestic authorities and bodies which have sufficiently close links with the central government to be considered its emanations.[143] It is nevertheless evident that no definite answer exists to the question of what should be regarded as a public body. Different solutions are given in this respect not only from the one legal system to the other but also by the various courts within the same national legal order. Such a classification is usually attempted on the basis of three different criteria, but it is far from clear whether they operate autonomously from each other or whether they have to be combined in order to bring definitely a given legal entity within the notion of the public administration.[144] Emphasis is sometimes placed on the material criterion, referring to the nature of the activity performed by the body under consideration. Very often, the existence of a certain measure of public control is required. Finally, the focus is sometimes turned on the prerogatives of public power enjoyed by a specific legal entity in the exercise of its functions.

Even as a matter of Community law, the question has not received yet a uniform treatment. The closest that the case law has ever come to providing a general definition was in the *Foster* case.[145] Following it, it has been clarified that bodies providing a public service under governmental control and enjoying for this purpose special powers going beyond those which result from the normal rules applicable in relations between individuals are included in any event among the legal entities against which the direct effect of Directives can be relied upon.[146] The problem is that *Foster* does not provide an exhaustive test but merely an indicative formula.[147] It is rather vague and does not specify the concepts of public service, governmental control and exercise of special powers. It is thus wondered if, and under which conditions, a body failing to meet the totality of the *Foster* criteria

[143] See the answers given to question VI of the XXI FIDE Conference questionnaire (Stockholm, 1998).
[144] See the approach on this point of the French, German and UK systems of public liability as described by Haguenau : *L'application effective du droit communautaire en droit interne*, Bruylant 1995, pp. 471 *et seq.*
[145] Case C-188/89, *Foster v. British Gas plc.* [1990] ECR I-3313.
[146] *Ibid.*, par. 20.
[147] This is evident from the wording of the *Foster* test itself. In the same direction, see especially the English Court of Appeal in *National Union of Teachers and others v. Governing Body of St Mary's Church of England (Aided) Junior School* [1997] 3 CMLR 630.

could be nevertheless classified as a public emanation. Since *Kampelmann*[148], it seems that the public control and special powers criteria operate on an alternative rather than on a cumulative basis. It appears that the satisfaction of any of them may suffice to bring a body within the concept of the public administration in the field of the direct effect principle. It is nevertheless asked whether the same should also be the case in other legal areas.[149] The fact that a given entity has been identified with the public administration for direct effect purposes provides useful guidance as to the treatment that it will possibly receive in another related field of law but it does not lead of itself to conclusive results.[150] This is especially so, since the argument is often put forward that the judicial pronouncements on the matter are made by having regard to what would serve best the interests of the law in any given scenario.[151]

2.3.1. The relevant pronouncements under Francovich : Recent case law has clarified that *Francovich* covers also violations committed by decentralised entities and public bodies. That this was indeed so had been accepted at doctrinal level long before its judicial establishment.[152] In the context of a preliminary ruling in *Banks*, it had already been opined that the imposition of public liability was possible even for breaches committed by bodies that satisfied the conditions of the *Foster* test.[153] Despite the absence of relevant case law on the matter, certain national courts had not hesitated to order the payment of damages from the public treasury for infringements committed by the local authorities.[154] However, it was not until fairly

[148] Cases C-253 to 258/96, *Kampelmann and others v. Landschaftsverbund Westfalen-Lippe* [1997] ECR I-6907, par. 46.

[149] On the notion of the State under Community law, see Hecquard-Theron : 'La notion d'Etat en droit communautaire', (1990) 26 *RTDE* 693, Curtin : 'The Province of Government : Delimiting the Direct Effect of Directives in the Common Law Context', (1990) 15 *ELRev* 195 and Kvjatkovski : 'What is an "Emanation of the State" ? An Educated Guess', (1997) 3 *EPL* 329.

[150] The notion of a public body or a public authority has been examined under Articles 28, 39 (4), 86 and 87 ECT. Also under Article 1 of Directive 71/305 of 27 July 1971 on the co-ordination of procedures for the award of public works contracts (JO 1971, L206/26), Article 4 (5) of Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes (OJ 1977, L145/1) and Commission Directive 80/723 of 25 June 1980 on the transparency of financial relations between the Member States and public undertakings (OJ 1980, L195/35).

[151] Prechal : *Directives in EC Law : A Study on EC Directives and their Enforcement by National Courts*, OUP 1995, p. 79, Hartley : *op cit.* No 103, p. 211. Also see the Opinion of Advocate General Van Gerven in *Foster* : *op cit.* No 145, at 11.

[152] Indicatively, see Bebr : (1992) 29 CMLRev 557, at p. 578, Charrier : 'L'effectivité du droit à réparation conféré par le droit communautaire européen : élaboration d'une théorie générale de la responsabilité', (1997) 19 *RIE* 35, at p. 43, Pardon and Dalcq : 'La responsabilité des Etats Membres envers les particuliers en cas de manquements au droit communautaire', (1996) 115 *JT* 193, at p. 198, Prechal : *ibid.*, p. 321, Fines : 'Quelle obligation de réparer pour la violation du droit communautaire ?', (1997) 33 *RTDE* 69, at p. 73.

[153] Opinion of Advocate General Van Gerven in Case C-128/92, *Banks v. British Coal* [1994] ECR I-1209, at point 41.

[154] For example, see the decision of the Irish High Court in *Dermot Coppinger v. The County Council of the County of Waterford, Toyota Motor Distributors (Ireland) Ltd and Toyota Motor Corporation* (noted by Travers : 'The Liability of Local Authorities for Breaches of Community Directives by the Member States', (1997) 22 *ELRev* 173). Also see the decision of 25 October 1995 of the District Court of Utrecht in *Lubsen-Brandsma*.

recently that the opportunity was finally given to adjudicate on this specific point in the context of public liability actions brought under the doctrine.

In *Konle*[155], one of the questions referred to by the national court concerned the allocation of responsibility between central government and federated entities. The answer given to it established that the payment of damages can be sought even for breaches committed in the exercise of legislative and executive powers by organs that enjoy a certain degree of constitutional autonomy from the central administration.[156] It was clarified that the defendant is not allowed to plead the distribution of powers and responsibilities between the bodies that exist in its national legal order, so as to free itself on this basis from any ensuing liability.[157] Receipt of compensation may be thus sought for the illegal activity of local authorities[158], federated entities[159] and autonomous communities.[160] This is in perfect harmony with the direct effect case law, which has interpreted the notion of the public administration as covering both central and decentralised authorities.[161] It is also in consistency with the possibility to initiate enforcement actions for violations attributed to bodies that operate with some measure of institutional and functional autonomy from the central government.[162]

Further clarification on the matter has been provided for in *Haim.*[163] The case concerned a professional body that had applied inconsistent national law, causing loss to the applicant. By accepting the operation of *Francovich* in such circumstances, the application of the doctrine was extended to cover all breaches committed by bodies that qualify as public emanations. That this is indeed so has been confirmed by *Larsy.*[164] The damages action in that case was brought directly against a social security organisation, that had failed to provide a full retirement

[155] *Konle* : *op cit.* No 12.
[156] *Infra* 2.4.2.2. Also see Lengauer : (2000) 37 *CMLRev* 181.
[157] *Konle* : *op cit.* No 12, par. 62.
[158] For example, municipalities.
[159] This is the case in Austria, Belgium and Germany. An interesting situation arises in the UK after the devolution of power to Scotland and Wales.
[160] Such a division of competence between the central government and the autonomous communities can be seen in Spain. Rather different is the situation in Portugal and Finland, where the question is whether the national treasury should be obliged to answer for violations committed by the autonomous regions of Azores and Madeira and the authorities of the Åland Islands.
[161] Case 103/88, *Fratelli Costanzo SpA v. Commune di Milano* [1989] ECR 1839, par. 30-31.
[162] Indicatively, *Commission v. Belgium* : *op cit.* No 102.
[163] Case C-424/97, *Salomone Haim v. Kassenzahnärztliche Vereinigung Nordrhein* [2000] ECR I-5123.
[164] *Larsy* : *op cit.* no 11. The facts of the case are set out in 3.3.3.2(b) below.

pension to the plaintiff as required by the applicable legislation.[165] It is now apparent that the imposition of governmental liability is possible whichever public authority is responsible for the breach and whichever public body is obliged under national law to make reparation for the loss suffered by the applicant.[166]

2.3.2. Defining the notion of the public administration for the purposes of damages liability : There is thus little doubt that the concept of the defendant under *Francovich* is given also a vertical dimension. Notwithstanding this fact, the controversy surrounding the notion of the public administration makes it often difficult in practice to determine whether a given plaintiff can rely upon the doctrine with regard to loss originating from the illegal activity of bodies that move at the boundaries between public and private sector. It could be nevertheless argued that at least bodies responsible for the performance of the classic duties of government should be accepted as part of the public administration. A minimum consensus can be probably reached around entities such as the armed forces, organs entrusted with the maintenance of public order and safety[167], bodies responsible for the correct administration of justice and the tax authorities.[168] To the extent that it is relevant, these are the bodies for which it has been suggested authoritatively that they fall within the employment in the public service proviso in the field of free movement of workers.[169] This proviso basically corresponds to the concept of public employment. It has been given accordingly a very narrow interpretation, as introducing an exception to the application of a fundamental legal principle. One would thus expect that at least the above mentioned bodies should be included among those, the activities of which can give rise to a *Francovich* action.

2.3.2.1. The control test : It should further be accepted that the nature of the activities performed by a given body and the legal status that it formally enjoys in its national legal order should be irrelevant for the application of *Francovich*, when it

[165] Council Regulation No 1408/71 of 14 June 1971 on the application of social security schemes (OJ 1971, L149/2).
[166] *Konle* : *op cit.* No 12, par. 62, *Haim* : *op cit.* No 163, par. 27, *Larsy* : *op cit.* No 11, par. 35.
[167] Case 222/84, *Johnston v. Chief Constable of the RUC* [1986] ECR 1651, with regard to the direct effect principle.
[168] Case 8/81, *Becker v. Finanzamt Münster-Innenstadt* [1982] ECR 53 and Case C-221/88, *ECSC v. Bussent* [1990] ECR I-495, as concerns the bodies against which the direct effect of Directives can be invoked.
[169] Commission Document (OJ 1988, C72/2).

can be shown that it exercises its functions clearly under substantial public control. The loss sustained by the individuals in such circumstances is due primarily to governmental directions and orders. Resort to such a control test is made in various legal areas. In the field of free movement of goods, the respect of the obligation to refrain from the imposition upon imports of quantitative restrictions and measures having equivalent effect thereto has been required also from bodies that exercise their activities under a certain degree of public direction promoting the economic objectives pursued by the central government.[170] A certain degree of *de jure* or *de facto* control is also required for the classification of an undertaking as public for the purposes of Article 86 ECT.[171] The existence of substantial public interference in the performance of its activities also seems to be the crucial factor for a body to be considered as a public emanation under Directive 71/305.[172] It is thus apparent that the government should be obliged to answer "in respect of anything that lies within the sphere of responsibility which by its own free choice has taken upon itself, irrespective of the person through whom that responsibility is exercised".[173] However, not any kind of public involvement should suffice to bring the activities of a given body under the scope of the *Francovich* doctrine.[174] The crucial issue is thus to determine the point after which the governmental interference with the activity of the wrongdoer is of such an intensity as to justify the imposition of public liability, when the relevant conditions are met.

There are various forms that the exercise of influence over the conduct of a legal entity may possibly take. The central government may interfere in an indirect way, by appointing the board of directors of a given body and by exercising a certain degree of supervision over the performance of its duties. It may also choose to regulate intensively a certain activity through the provision of binding directions to

[170] Indicatively, see Case 249/81, *Commission v. Ireland* (the *Buy Irish* case) [1982] ECR 4005 and Case 45/87, *Commission v. Ireland* (the *Dundalk Water Supply* case) [1988] ECR 4929.
[171] Indicatively, see Cases 188 to 190/80, *France, Italy and United Kingdom v. Commission* [1982] ECR 2545, p. 2579
[172] Directive 71/305 : *op cit.* No 150. Very characteristic in this respect is Case 31/87, *Beentjes v. Netherlands* [1988] ECR 4635. A local land consolidation committee was considered as covered by the scope of that Directive by virtue of the fact that its composition and functions were laid down by legislation, its members were appointed by a public body, its acts were subject to the governmental supervision and its activities were financed by the national treasury.
[173] Opinion of Advocate General Van Gerven in *Foster* : *op cit.* No 145, at point 21.
[174] In this respect, see the submissions of the UK Government in *Foster* (*ibid.*). It argued that for reasons of public policy the activity of a wide variety of entities is somehow regulated by the government, without these bodies becoming part of the public administration. It went on to refer specifically to banks, insurance companies and independent schools as examples of such kinds of bodies.

the bodies exercising it and through the determination of the exact scope of their functions, which it can freely alter by legislative means. Especially with regard to commercial undertakings, it may acquire the majority of the shares in a given company and even a blocking minority thereof without intervening actively in its activities and otherwise monitoring the way that it chooses to operate as a market participant. Even more controversially, it may merely offer financial support in the form of total or partial subsidies without being easy to determine the extent to which this affects the way that the financed entity performs its functions.

The great variety of forms that this public involvement may practically take makes it virtually impossible to provide an exhaustive formula that could determine the exact circumstances, under which the existence of governmental control would justify the application of the *Francovich* doctrine. Inevitably, it is only some general guidelines that can be offered in this respect. The mere provision of public subsidies should certainly not suffice of itself to bring a given legal entity within the category of bodies that operate under the control of the public administration, expressing in substance the governmental will. The decisive criterion should always be the actual influence exercised on the drafting of the operational strategy of the body and the adoption of its decisions, in the fields where it performs its functions. It should not matter whether such an influence is exercised *de jure* or *de facto*. Whether this control is made possible by virtue of legislative provisions, ownership or dependence of the management on governmental appointment and directions is irrelevant, so long as it is substantial.[175]

The measure of the governmental control that should exist in order for such a decisive influence to be established remains unclear. Some national courts adopt a rather stringent standard, requiring the existence of an assured control of a servant or agent.[176] Others follow a more liberal approach.[177] For them, the mere fact that a

[175] In this direction, the Opinion of Advocate General Van Gerven in *Foster*: *op cit.* No 145, at point 21.

[176] For example, *Rolls Royce plc. v. Doughty* [1988] 1 CMLR 569. The Employment Appeal Tribunal found that the defendant was not bound by the direct effect of Directive 76/207, since it could not be assimilated to a governmental organ or agent carrying out a public function. It thus overturned the decision of the Industrial Tribunal, which had classified Rolls Royce as a public body on the basis that the State constituted its sole shareholder.

[177] In *Griffin and others v. South West Water Services Ltd* [1995] IRLR 15, the High Court held that "in determining whether a body provides a public service "under the control of the State", the question is not whether the body in question is under the control of the State, but whether the public service in question is under the control of the State. The legal form of the body is irrelevant, as are facts that it is a commercial concern, that it does not carry out any of the traditional functions of the State and is not an agent of the State, and that the State does not possess a day-to-day control over the activities of the body".

given activity is regulated by the government suffices for the classification of the legal entity that performs it as a public emanation. In either case, the public influence should be employed in such a way as to differentiate the body subordinated to it from all other legal subjects over which a certain degree of authority is always exercised through the normal legislative means.[178]

2.3.2.2. The material and prerogatives of public power criteria : Given that one of the most important characteristics of government is the power to exercise authority over individuals and to determine the extent of their legal rights and obligations, the public machinery can also comprise bodies which are in a position to alter the legal position of private parties regardless of their classification in the domestic legal order.[179] It should not matter in this direction whether this authority is exercised directly through the traditional public machinery or by bodies, to which the relevant power has been delegated by the central administration. It makes indeed little difference whether a certain legal entity is operating as a servant or agent of the State, so long as it is exercising power on its behalf. For example, there is little doubt that liability should be imposed for breaches committed by societies entrusted with public functions concerning the regulation of certain professions and the recognition of professional qualifications.[180] The case law had already classified as public the activities of such professional bodies in the fields of free movement of goods and persons.[181] In *Haim*[182], it was confirmed that this is equally so under *Francovich*. The question asked in that case was whether a damages action could be brought cumulatively against the central government and the independent professional society that had applied the inconsistent national legislation. The answer given accepted that the activities of the defendant *Kassenzahnärztliche Vereinigung Nordrhein* could indeed give rise to such a public liability claim.[183]

[178] Opinion of Advocate General Van Gerven in *Foster* : *op cit.* No 145, at point 21.
[179] Also see the Opinion of Advocate General Van Gerven in *Foster* : *ibid.*, at point 21.
[180] At doctrinal level, this has been suggested by Bebr : *op cit.* No 152, at p. 578, Charrier : *op cit.* No 152, at p. 43, Somsen: (1996) 5 *EELRev* 287, at p. 293.
[181] Cases 266 & 267/87, *The Queen v. The Royal Pharmaceutical Society of Great Britain* [1989] ECR 1295, Case 271/82, *Auer v. Ministère Public* [1983] ECR 2727, Case 5/83, *Criminal proceedings against Rienks* [1983] ECR 4233, Case 71/76, *Thieffry v. Conseil de l'ordre des avocats à la Cour de Paris* [1977] ECR 765.
[182] *Haim* : *op cit.* No 163.
[183] *Ibid.*, par. 25-34. Also see the Opinion of Advocate General Mischo, at points 12-35.

Greater uncertainty exists with regard to legal entities that perform a function serving the public interest, without exercising any authority of a governmental nature and without operating under an intensive public control. The definition of a public function is clearly a very challenging task. This concept can possibly cover functions such as the provision of education and health care[184], the supply of water, electricity and gas, public transport services and generally any activity that would seem beneficial to wide categories of individuals. However, it would be irrational to impose public liability for the conduct of entities that perform such functions clearly outside the public law sphere. For example, one could think of private schools and hospitals that offer services in the general interest without any kind of governmental interference and support. As a result, the public service criterion will usually not suffice of itself to lead to definite conclusions as to the private or public status of a given legal entity. It can nevertheless operate in combination with the control test, so as to permit the application of *Francovich* with regard to breaches attributed to legal entities performing public functions and operating under the supervision of the public administration, without this public involvement being sufficient of itself to classify the body concerned as a State emanation.[185] The exercise of prerogatives of public power should also be taken into account, but their absence should not necessarily be conclusive.

2.3.3. Concluding remarks : The conclusion that seems to arise in this respect is that it is not possible to formulate a single definition of the concept of the State for the purposes of *Francovich*. There will certainly be no problem, if the breach is attributed to a body that meets both the material and the control criteria and exercises prerogatives of public power. It will otherwise be necessary to embark

[184] For example, Case 152/84, *Marshall v. Southampton and South-West Hampshire Area Health Authority (Teaching)* [1986] ECR 723. The Court classified the respondent health authority as part of the public apparatus, clearly on the basis of the nature of the duties entrusted to it.

[185] Universities constitute a very controversial case in this respect. They usually enjoy a considerable operational independence but are heavily subsidised from the national treasury and perform the public service of education under a strictly determined legal regime. The different conditions under which they operate in the various legal systems may lead to diversity of solutions as to their classification as public or private bodies. Thus, in *Turpie v. University of Glasgow*, a Scottish Industrial Tribunal concluded that the University of Glasgow was not a public emanation on the basis of the operational independence that it enjoyed from the central government (decision of 26 September 1986). In Case C-419/92, *Scholz v. Opera Universitaria di Cagliari* [1994] ECR I-505, the Court seemed to proceed on the basis that the University of Cagliari was a public body.

upon a delicate assessment of the specific characteristics of the entity concerned, in order to determine the capacity under which it operates in its national legal order. It is nevertheless clear that public liability actions may only be available with regard to infringements committed by three basic categories of bodies. The first comprises legal subjects exercising authority of a governmental nature. The second is covering entities operating under a substantial governmental control. The third encompasses bodies performing a public function in the general interest, in circumstances that closely link them with the public administration and permit their classification as an extension of the traditional system of governance.

Even if a certain body can be considered as public under either of the above mentioned classifications, it will still be necessary to determine whether the application of the *Francovich* doctrine will be possible for the totality of the breaches that may be attributed to it or merely for those that have been committed in the specific fields where it exercises its authority over individuals or operates under a decisive governmental control or performs accordingly the public duties entrusted to it.[186] To accept that a legal entity can be considered as public only for part of its activities is not a totally unknown phenomenon in the case law developed under the preliminary reference procedure.[187] Furthermore, the imposition of governmental liability for breaches committed in fields where the wrongdoer does not enjoy any special status and privilege that could possibly establish its linkage with the central administration might lead to the payment of damages from the public funds for the illegal activity of bodies that operate on certain occasions in a private law capacity. This being said, the judicial approach followed in the field of the direct effect principle seems to lead to exactly the opposite conclusions. Once the material criterion or the control test are satisfied, the body under examination falls automatically in its entirety within the concept of the public administration regardless of the capacity under which it appears in a given litigation.[188] It is thus to

[186] See Brealey and Hoskins : *Remedies in EC law*, Longman 1998, p. 132. They argue that *Francovich* should only be available when the organ concerned is acting in some administrative or public capacity, as opposed to a private capacity.
[187] For example, Cases 231/87 and 129/88, *Carpaneto Piacentino v. Ufficio Distrettuale delle Imposte dirette di Fiorenzuola d'Arda* [1989] ECR 3233. The Court interpreted Article 4 (5) of Directive 77/388 (the Sixth VAT Directive) as drawing a distinction with regard to the activities engaged by the bodies under consideration. Some of them are governed by a special legal regime, while others are subjected to the same conditions that apply in respect of private parties. This second category of activities cannot be considered as emanating from a public authority in the meaning of the Directive.
[188] This was accepted indirectly in *Marshall* : *op cit.* No 184, par. 49. Also the position of Advocate General Slynn, at p. 735.

be expected that the same wide approach will be probably followed also for the purposes of the imposition of *Francovich* liability.

2.4. Finding the appropriate defendant in public liability actions under Francovich[189] **:** The conclusion that arises from the relevant case law seems thus to be that the application of *Francovich* is possible with regard to both breaches committed by any of the three branches of government and violations attributed to decentralised national authorities and public bodies. This gives rise to a problem, which is basically twofold. It is not thus always easy to determine whether a given violation has been committed in a legislative, administrative or judicial capacity. It is further asked whether the obligation to pay damages to the suffering individuals should always be imposed on the central government. The question in this latter case is whether the relevant action may or should be sometimes brought also against the specific public authority or body responsible for the breach.

2.4.1. The horizontal dimension of the problem : The allocation of responsibility between the three branches of government : It does not seem possible in this respect to provide any generally applicable test as to the circumstances in which the damage suffered by a certain individual will be linked directly with a violation committed by the one or the other arm of government.[190] The matter will be thus resolved necessarily on an *ad hoc* basis. Notwithstanding this fact, the case law has offered recently some guidance in this field as concerns cases where the question is whether a given breach should be imputed to the legislature or the administration.

[189] Also see Anagnostaras : 'The allocation of responsibility in State liability actions for breach of Community law : A modern Gordian knot ?', [2001] 26 *ELRev* 139.

[190] Consider the following example : A Member State fails to implement in time Council Directive 89/48/EEC of 21 December 1988 on the mutual recognition of higher-education diplomas (OJ 1989, L19/16). The public body responsible under the national legislation for the recognition of the equivalence of foreign degrees to the domestic ones refuses to accept the equivalence of certain degrees meeting the requirements of Directive 89/48. Consequently, the individuals concerned are refused entry to their profession. An action is brought in the highest administrative court for the annulment of the decisions of that body. The court rejects the action, without even making a reference to the Court. If the affected individuals were to bring a *Francovich* action on the basis of the loss suffered in the period that they could not exercise their profession, what kind of breach should they try to establish ? A legislative one, based on the failure of the State to implement in time the relevant Directive; an administrative one, linked with the denial of the public body concerned to apply the provisions of a directly effective measure; or maybe a judicial one, originating from the failure of the national court to annul the inconsistent decisions of that body and the violation of its obligation to refer the case for a preliminary ruling ?

In *Brinkmann*[191], the liability action was brought on the basis of the failure of the defendant to implement in the domestic legal order the legislation on the taxation of manufactured tobacco.[192] It was established that such a violation had indeed taken place on the facts of that case.[193] It was nevertheless noted that the national administrative authorities had applied directly the provisions of the unimplemented measure, albeit in an erroneous way. The conclusion was then reached that, when the administration gives immediate effect to an unimplemented measure, any loss sustained by individuals is not due to the failure of the national legislature to transpose its provisions in the domestic legal order but rather to the misinterpretation and misapplication of its requirements by the administrative authorities.[194] It was accepted thus that the interposition of the administration between the inaction of the legislature and the loss sustained by the plaintiff operated as a factor that broke the chain of causation and linked the damage with the public authority that actually gave effect to the unimplemented provision, permitting its application in the specific case under examination. There is certainly a great deal of logic in this argument. From the moment that the requirements of a given legal measure are somehow applied in practice, it seems to make little difference for the legal position of individuals whether implementation at national level has taken place or not. In fact, the situation in *Brinkmann* does not seem to be dramatically different from the one where the domestic authorities apply in an erroneous way the provisions of a properly transposed Directive. In both cases, any detriment suffered is due to the activity of the administration. The gravity of the alleged infringement should be ascertained accordingly on the basis of the clarity and precision of the law in the field where the violation has been committed.

Brinkmann appears to introduce an exception to the rule that the failure to take any action to transpose a measure in the domestic legal order within the period laid down for that purpose constitutes automatically a sufficiently serious breach.[195] When the administrative authorities have tried to give immediate effect to the

[191] *Brinkmann* : *op cit.* No 11.
[192] Council Directive 79/32 EEC of 18 December 1978 (Second Council Directive) on taxes other than turnover taxes which affect the consumption of manufactured tobacco (OJ 1979, L10/8).
[193] *Brinkmann* : *op cit.* No 11, par. 27.
[194] *Ibid.* In the same spirit, the Opinion of Advocate General Jacobs, at point 30.
[195] *Dillenkofer* : *op cit.* No 12, par. 29. For more on this specific point, see *infra* 3.3.3.

provisions of that measure despite the absence of implementing legislation, the gravity of the infringement complained of by the applicant will not be established automatically. It will be rather ascertained on the basis of the degree of clarity of the law in the specific area, where the alleged illegality has occurred. In *Brinkmann*, attention was paid to the clarity and precision of the provisions of the unimplemented legislation.[196] The conclusion finally reached was that the administrative authorities had not committed a sufficiently serious breach in its application, given the particularities of the case under consideration.[197] The implication is clear. The administration is given a further incentive to apply the law directly, even in the absence of national implementing legislation. By doing so, it may prevent the imposition of public liability under the rule of the *per se* sufficiently serious breach. It is hardly surprising that the case law has proceeded to such a step, given the clear interest of the law in the actual application of its provisions rather than in the imposition of financial liability for their violation.

Although *Brinkmann* was decided with regard to an unimplemented measure, it could be argued that the same solution on the allocation of responsibility between the administration and the legislature can be adopted even outside the factual background of this litigation. This could first be the case, where the breach of the administrative authorities consists in their failure to give effect to any directly effective provision by setting automatically aside any national norm conflicting with it. Since *Costanzo*[198], it has been clarified that the direct effect principle and the obligations emanating therefrom bind not only the national courts but also the totality of the domestic authorities, including the administrative ones. It is irrelevant in this respect whether the administration has committed the breach in the exercise of discretionary powers conferred upon it by the legislature or whether it was merely enforcing the domestic legislation, carrying out binding governmental instructions. Even when the public authorities have no room for manoeuvre under their domestic legal system, they are empowered and obliged to take all the necessary measures to ensure that any obligations undertaken in the field of Community law are fully

[196] *Brinkmann* : *op cit.* No 11, par. 30.
[197] *Ibid.*, par. 31.
[198] *Costanzo* : *op cit.* No 161, par. 30.

complied with. This includes even the disapplication of any national law provision, that contravenes directly effective provisions.[199] The administration is also under the duty to interpret as far as possible its domestic legislation in the light of any relevant Community law.[200] It could be thus maintained that any damage emanating from its failure to reconcile, when possible, the wording of inconsistent national law should equally be imputed to it.

This line of argument leads to the conclusion that there exist only two scenarios, in which the conduct of the legislature will be considered beyond doubt as the primary cause of the loss of the applicant. This will first be the case, when the damage sustained by the plaintiff emanates directly from a legislative breach without the interposition at any stage of an administrative authority. The same will also hold true, when the violation concerns the infringement of provisions that fail to meet the direct effect requirements. In this latter case, it must further be shown that the operation of the principle of consistent interpretation is not possible either. Indeed, there is no obligation upon the administration to give effect to legal norms that do not fulfil the criteria for direct effect and which are so clearly drafted that are not at all open to consistent interpretation. It would thus seem reasonable to hold that any loss sustained due to the application of inconsistent national legislation in such circumstances should be imputed to the legislature, that has actually adopted it.

2.4.2. The vertical allocation of governmental liability under Francovich and the choice of the appropriate defendant problem : This brings forward another important issue. The question is thus whether damages should always be paid from the national treasury or whether reparation can also be sometimes sought from the specific public body whose conduct constitutes the basis of the relevant liability action. In essence, it is asked whether the defendant under *Francovich* can only be the central government or also the specific wrongdoer that committed the violation giving rise to the loss of the applicant. This issue carries with it serious practical consequences, when the defaulting public entity possesses funds of its own which

[199] *Simmenthal* : *op cit.* No 63.
[200] *Von Colson* : *op cit.* No 101. That the obligation to proceed to such a consistent interpretation binds not only the courts but all the national authorities generally can be seen in Case C-165/91, *Van Munster v. Rijksdient voor Pensioenen* [1994] ECR I-4661.

are separate from those of the central administration. It does not otherwise really matter whom the liability action is brought against so long as reparation is always made from the public finances, either directly or indirectly.

The problem arises in two basic scenarios.[201] In many national legal orders, the legislative power is devolved according to federal arrangements. As a result, the competence to adopt the measures which are necessary to ensure compliance with the obligations undertaken at international level often lies with the regional rather than the central government. The question is thus whether any claims brought under *Francovich* should be directed against the central administration, despite the fact that the latter did not possess any legal means of obliging the defaulting regional entity to proceed to the required action, or whether it would be more appropriate to seek reparation directly from the decentralised authority responsible for the breach. It has further been established that all domestic authorities are obliged to comply with any directly effective provision[202] and to interpret as far as possible their national law in accordance with the requirements of the Treaty and the secondary legislation.[203] It is thus wondered whether the obligation to pay damages in such circumstances should burden the national treasury or rather the specific public body that failed to give practical effect to the supremacy mandates, by setting aside inconsistent national legislation or by interpreting it in the light of the requirements of the indirect effect principle. Some recent case law has shed light on this field. However, there are various concerns and objections arising from the way that the issue has been actually dealt with.

2.4.2.1. A construction based on the determination of the entity that possessed the decisive power in the field where the breach was committed : Legal logic seems to suggest that it would be more appropriate for liability to lie always with the entity, be that the central government or one of its component parts, that possessed the decisive power in the area where the breach has been committed. When the loss

[201] Given that the judiciary constitutes one of the three branches of government, it could also be asked whether liability for judicial breaches should be imposed on the central State or rather on the specific court that has committed the violation. For a plurality of reasons, however, the imposition of personal *Francovich* liability on the judges should be considered as unthinkable.
[202] *Costanzo* : *op cit.* No 161.
[203] *Von Colson* : *op cit.* No 101.

sustained by the plaintiff is due primarily to the arbitrary exercise of the discretion and autonomy that a given public entity possesses under its domestic legal system, it would appear thus much more appropriate to impose directly upon it any financial burden that its unlawful activity has given rise to.[204] This should be clearly so in countries with a federal structure, where the central authorities are not always empowered to adopt the measures that are necessary to give effect to their international law obligations.[205] However, there is no reason why the same should not hold equally true in respect of any public authority and body that commits a given violation in a field where it possesses an operational autonomy in the performance of its functions. Indeed, any damage suffered by individuals in such circumstances is linked directly with the activity not of the central government but rather of the specific public entity that disregarded the obligations imposed upon it by the law. As it was correctly opined in *Haim*, it would be irrational in a democratic regime to hold the central government responsible for breaches attributed to entities enjoying a certain degree of institutional autonomy by virtue of national constitutional arrangements.[206] This is especially so, since liability must be the corollary of the erroneous exercise of authority. The payment of compensation from the national treasury should be reserved in such circumstances only for cases, where the funds of the wrongdoer do not suffice for the complete financial reinstatement of the infringed legal right of the applicant.

It would also seem preferable for the payment of damages to be made from the national treasury, when the violation is attributed to a public authority or body operating in a given field under the control of the central government without possessing any substantial freedom of action. Any loss sustained by individuals in such a case does not originate from the autonomous action of the wrongdoer, but rather from the performance of the duties ensuing from its position in the national administrative hierarchy.[207] It is interesting at this point to refer to a dictum of the

[204] In this respect, Lewis : *Remedies and the Enforcement of European Community Law*, Sweet & Maxwell 1996, p. 143.
[205] Temple Lang (a) : 'The Duties of National Authorities Under Community Constitutional Law', (1998) 23 *ELRev* 109, p. 128, Temple Lang (b) : 'New legal effects resulting from the failure of States to fulfil obligations under EC law : The Francovich judgment', [1992-93] 16 *FILJ* 1, p. 37, Harlow : 'Francovich and the Problem of the Disobedient State', (1996) 2 *ELJ* 199, p. 209, Pâques : 'Trois Remèdes à l'inexécution du droit communautaire : utilité pour l'environnement ?', (1996) 73 *RDIC* 135, pp. 196-197.
[206] Opinion of Advocate General Mischo in *Haim* : *op cit.* No 163, at point 31.
[207] This view is also shared by Brealey and Hoskins : *op cit.* No 186, p. 132 and Lewis : *op cit.* No 204, p. 143.

House of Lords in *Kirklees*[208], with regard to an infringement of the obligation to refrain from the imposition on imports of quantitative restrictions and measures having equivalent effect thereto. It was declared there that any ensuing liability should be imposed on the central government and not on the local authority, that simply carried out its binding duties under national law. This statement has been criticised, as failing to take into account the fact that the public administration comprises not only the central government but also decentralised authorities and public bodies.[209] It needs nevertheless to be applauded, if it merely wants to say that the central administration and not its constituent parts is the appropriate defendant under *Francovich* when the breach has been committed in the exercise of binding governmental directions.

However, the issue is not as simple as it *prima facie* seems. The administration is placed under the statutory duty to enforce the domestic legislation, in order to give effect to the binding governmental will. The obligation is also imposed upon all national authorities to ensure compliance with the Community law obligations, regardless of the measure of discretion that they enjoy in the exercise of their functions in a given legal area. The question is thus whether this duty justifies the imposition of financial liability directly on the specific public authority that has failed either to give immediate effect to directly effective provisions or to apply, where possible, the principle of consistent interpretation.

The answer should certainly be in the negative. The obligation to give practical effect to the principle of supremacy has certainly repercussions for the determination of the legislative or administrative capacity in which a given violation has actually been committed.[210] It further means that the application of *Francovich* is not ruled out by the fact that the wrongdoer is not directly identified with the central government. This does not automatically entail that liability should always be imposed on the specific authority, that was faced with the dilemma of either complying with its statutory duties under national law or giving effect to its

[208] *Kirklees BC v. Wickes Building Supplies Ltd.* [1991] 3 WLR 985.
[209] For example, see in this direction Usher : 'The Legal Framework for Implementation in the United Kingdom', in Daintith (ed.) : *Implementing EC law in the United Kingdom : structures for indirect rule*, Wiley 1995.
[210] See at this point the relevant discussion above on the decision in *Brinkmann* and the consequences that the reasoning used in that case may possibly have for the determination of whether a given breach should be attributed to the legislature or the administration.

supranational obligations and facing the consequences linked with the disregard of the governmental instructions. Neither does it entail conferring immunity on the central government, the binding directions of which may constitute the primary cause of a given breach. Liability actions for the illegal activity of the same public entity may thus need to be brought against different defendants, depending on the specific field in which the violation has taken place. When the wrongdoer has committed the breach in the exercise of discretionary powers, it would seem preferable to bring the claim directly against it. When it has been operating under binding governmental directions, the action would better be brought against the central administration.[211]

The imposition of public liability on the specific legal entity that possessed the power which is causally linked with the loss sustained by the plaintiff carries with it serious advantages from a multiple point of view. It has to be recalled that *Francovich* performs a dual function. In the first place, it aims at reinstating the plaintiff to the financial position that he would have been in, had the specific violation in issue not taken place. It also provides the incentive to the public authorities to be more responsible in the exercise of the duties imposed upon them by the law, in the knowledge that their unlawful activity will not remain unpunished. The effective operation of this preventive function presupposes the correct identification of the body which is to be blamed primarily for a given breach and the subsequent initiation of the relevant damages action against the appropriate in each case defendant. A public body that enjoys a certain degree of operational and financial independence from the central government can hardly thus be inhibited from continuing its unlawful conduct, when the obligation to make good the loss that its activity has given rise to always burdens the national treasury. This is especially the case with regard to federal countries. It does not really seem very effective to impose liability on the central administration for breaches attributed to the federated entities, over the activities of which the federal government usually

[211] For example, consider a public entity that has been entrusted with the provision of public service under governmental control but which operates in an autonomous way with regard to its employment policy. While it would seem reasonable to impose liability on the national treasury for violations committed in the field where this body operates under governmental control and performs functions of a public nature, it would appear more appropriate to bring the damages claim directly against it in respect of breaches committed by it *qua* employer.

exercises little or no control at all. At the opposite end, the central administration is not really punished for its failure to perform the legal duties undertaken by it, when it is allowed to transfer any liability to the shoulders of bodies exercising functions of a public nature without enjoying any latitude as to the way that they will give effect to the binding statutory obligations imposed upon them.

Furthermore, the imposition of the obligation to make good the loss sustained by the plaintiff on the specific regional or local authority that failed to exercise correctly its operational discretion under national law seems to be the only acceptable solution from a domestic constitutional perspective. Indeed, the decentralisation of power presupposes logically the simultaneous transfer to its new holder of any responsibility for its appropriate exercise. As a result, to impose liability on a legal entity for a breach committed in a field where it possesses no power of control over the activity of the bodies operating therein would interfere with the national constitutional arrangements on the allocation of power and responsibility between the central and the regional government.[212] The central government can be certainly shielded against the possibility of being held liable under *Francovich* for the failure of its decentralised authorities to comply with the legal duties undertaken by it, by reserving for itself the power to substitute its constituent parts in the adoption of the measures that are required in order to give effect to the obligations that emanate from the participation in supranational organisations.[213] It is nevertheless very questionable whether such a development would be welcomed at national level, especially given the sensitive political balances that have to be kept within countries organised on a federal basis and the need to attain a certain degree of decentralisation of power in any domestic legal order. It would thus seem preferable to keep the power with the decentralised authority concerned, imposing directly upon it the obligation to make good any loss that its unlawful activity has caused to individuals.

[212] In the same direction, Harlow : *op cit.* No 205, p. 209.

[213] It is interesting in this respect to note the solution adopted in Belgium and Austria with regard to the adoption of the measures that are necessary to comply with a judgment given under the public enforcement mechanism. According thus to Article 169 of the Belgian Constitution, once Belgium has been condemned in the context of an enforcement action, the federal government can substitute the federated entities in the adoption of the measures that are necessary to give effect to the decision of the Court. This substitution only produces effects, until the federated entity that has the competence to proceed to the required action complies with the judgment. An identical solution on this point is also introduced by Article 23d (5) of the Austrian Constitution.

However, even if the wish to enhance the effectiveness of the law and the dissuasive power of the doctrine requires the targeting of the specific legal entity that possessed the crucial power in the field where the breach has been committed, it is equally true that any such system imposes a very heavy burden on the shoulders of individuals seeking damages under *Francovich*. Indeed, the need to identify the primary source of a given loss and to direct the relevant action against it obliges the plaintiff to determine the often complex division of powers between the central government and its component parts. This may prove a very demanding task, especially when the question arises with regard to breaches consisting in administrative or legislative inaction. The plaintiff could even see his action being dismissed on the basis that he did not identify properly the defendant, upon which the obligation to pay damages should be imposed. The imposition thus on individuals of the obligation to examine the complex arrangements of their domestic legal system, in order to exercise their right to receive compensation under *Francovich*, could weaken the restitutionary function of the doctrine. This could be interpreted as an infringement of the principle of effective judicial protection.

It has thus been suggested that it might prove more workable in practice to allow the plaintiff to bring his action always against the central government, leaving to the latter the choice of bringing subsequently a recoupment action against the national authority that it considers responsible for the loss of the plaintiff.[214] This would transform automatically the issue into a problem of internal allocation of liability for breaches of supranational obligations but would deny the possibility to exercise any kind of judicial control over the final imputation of the breach. A more attractive alternative would possibly be to allow the claim to be brought cumulatively against all possible defendants, entrusting the determination of the matter to the national court deciding the case. This would remove the burden of identification from the shoulders of the applicant to those of the judge, providing sufficient guarantees that the penalty will finally be imposed on the entity which possessed the crucial power that gave rise to the loss of the plaintiff.

[214] Dony : 'Le Droit Belge', p. 181, Bribosia : 'Le Droit Espagnol', p. 215 both in Vandersanden/Dony (eds.) : *op cit.* No 37.

2.4.2.2. The solution given by the Court : The conclusion reached thus far is that it would appear much more preferable to require the determination in each specific case of the body primarily responsible for a given breach and to proceed to the consequent imposition upon it any ensuing liability. However, a very delicate question arising in this respect is whether it is actually possible and politically desirable to intervene extensively in the field under consideration. In other words, what is asked in essence is whether the national arrangements on the identity of the defendant in public liability cases must remain totally intact under *Francovich* or whether the matter is of such an importance that should not escape some degree of judicial scrutiny. In the latter case, it needs to be ascertained what the intensity of the judicial intervention in this area should actually be. Recent case law seems to establish that the problem is considered as a purely procedural one, restricting thus to the absolute minimum any judicial control upon it. It is exclusively for each domestic legal order to sort out the allocation of responsibility between the various public entities, provided that individuals receive effective protection and that they are not discriminated against with regard to similar liability claims for violations of their national law.

This should hardly come as a surprise, given the current state of the law in the *Francovich* field. The doctrine operates regardless of the immunities that national law confers upon the various domestic authorities and it is further governed by uniform substantive conditions. Notwithstanding this fact, reparation is made in accordance with the domestic rules on liability, provided that the conditions laid down for that purpose are not less favourable than those relating to similar domestic claims and are not such as to make it impossible or excessively difficult to obtain compensation.[215] In *Konle*[216], the scope of this principle was extended to cover even the identification of the defendant that a public liability action should be brought against. It was stated that the national legal orders are not obliged to make any change in the distribution of powers and responsibilities between the public bodies which exist on their territory.[217] Although the case concerned countries with a

[215] *Brasserie/Factortame III* : *op cit.* No 6, par. 67.
[216] *Konle* : *op cit.* No 12.
[217] *Ibid.*, par. 63.

federal structure, the language used in it leads to the conclusion that the same reliance is made even outside the factual background of that litigation. That this is indeed so has been confirmed by further case law. As a result, the issue of the allocation of liability between the central administration and the public bodies carrying out the unlawful governmental policy has been brought within the ambit of the principle of national procedural autonomy. This denies in essence any extensive judicial intervention in the field under consideration.[218]

The Court appears thus to share the view that to entrust to each national legal order the determination of the appropriate defendant under *Francovich* is nothing more than a further modality for the restitution of the loss sustained by individuals, due to the failure of the domestic authorities to live up to their legal obligations. It is for each legal system to ensure that individuals will receive compensation for unlawful public activity, whichever public authority is responsible for the breach and whichever body is in principle obliged under national law for making reparation.[219] The need to enhance the dissuasive function of the doctrine, by targeting the specific legal entity whose activity is causally linked with the damage complained of the plaintiff, does not seem to have been given any attention. If the national procedural arrangements enable the rights which individuals claim under the doctrine to be effectively protected and it is not more difficult to assert them than those derived from the domestic legal system, the requirements set by the case law are fulfilled.[220] However, the defendant is not allowed to plead the distribution of powers and responsibilities between the bodies which exist in its national legal order so as to free itself from liability on that basis.[221] In essence, the principle of effectiveness is interpreted as referring to the protection of the economic interests of individuals. So long as these interests are effectively protected in the context of a given litigation, it makes little difference whom the relevant *Francovich* action is finally brought against. A blind eye is turned to the fact that the correct identification of the appropriate defendant in a public liability suit may in fact prove crucial for the effectiveness of the law and the attainment of the general objectives pursued by it.

[218] *Haim* : *op cit.* no 163. Also see the Opinion of Advocate General Mischo.
[219] Haim : *ibid.*, par. 27, *Konle* : *op cit.* No 12, par. 62, *Larsy* : *op cit.* No 11, par. 35.
[220] *Haim* : *ibid.*, par. 30-31, *Konle* : *ibid.*, par. 63-64.
[221] *Konle* : *ibid.*, par. 62, *Haim* : *ibid.*, par. 28.

There is thus no objection to the plaintiff bringing his action cumulatively against the central government and the public entity involved in a given violation, when this is allowed by the relevant national legislation.[222] National law is also not precluded from imposing upon the plaintiff the obligation to direct his claim exclusively against the central administration. It suffices that the same solution is also accepted with regard to infringements of similar domestic law rights and that the conditions under which reparation can be obtained meet the requirements set by the principle of effectiveness. In practice, the only situation where the respective domestic arrangements might need to be modified is when national law obliges individuals to bring their liability actions directly and exclusively against the specific legal entity whose unlawful activity has given rise to their loss.[223]

When the performance of legislative or administrative tasks has been entrusted to bodies enjoying a separate legal personality, any loss caused to individuals by their illegal activity does not necessarily have to be made good by the central government in order for the *Francovich* requirements to be satisfied.[224] Some degree of remedial intervention in this field may be nevertheless required, when either a more favourable treatment is offered to domestic law rights or when such an arrangement practically amounts to the plaintiff being deprived of any reasonable chance of obtaining redress directly from the defaulting public entity. This can be so, if the national legislation exonerates the defendant from any kind of liability for breaches committed in the faithful exercise of binding national statutory obligations[225] or if the claim has to be brought against a body without funds of its own adequate to cover the loss of the plaintiff.[226] In such circumstances, the principle of effectiveness will require either the setting aside of the specific obstacle preventing the effective application of the *Francovich* doctrine or the imposition on the central administration of the obligation to use public funds for the payment of compensation to the suffering individuals

[222] This was the question referred to by the *Landgericht Düsseldorf* in *Haim* : *ibid.* It has been answered in the affirmative by the Court (par. 32 of its judgment). Also see the Opinion of Advocate General Mischo, at point 34.
[223] *Haim* : *ibid.*, par. 31.
[224] Opinion of Advocate General Léger in *Larsy* : *op cit.* No 11, footnote 24.
[225] See the Opinion of Advocate General Mischo in *Haim* : *op cit.* No 163, at point 34.
[226] Example given by Lengauer : *op cit.* No 156, pp. 188-189.

The approach that seems to have been adopted in the field under consideration allows thus to use the causality factor, in order to impose any kind of liability under *Francovich* on the specific public entity that is considered responsible for a given breach. The only requirement set is that individuals receive effective protection of their infringed legal rights. This development will be certainly welcomed by the national governments, especially in countries organised on a federal basis and characterised by a great degree of transfer of power to local and decentralised authorities. It practically means that the national treasury will not necessarily undertake the financial burden arising from the unlawful activity of bodies, over which the central government does not exercise any decisive control. This is in accordance with the need to link any ensuing liability with the entity that possessed the discretionary power, that led to the perpetration of the breach. On the other hand, an escape route is created which may be used to transfer the obligation to make good damages to bodies that operate under statutory duties and possess funds of their own, separate from the ones of the central administration. The danger thus exists that the penalty will not be imposed on the primary wrongdoer but rather on a body that simply executes the binding governmental policy. It is to be doubted whether this actually serves the second objective pursued by *Francovich*, namely the imposition of an indirect pressure on the holder of a given power to exercise it in an appropriate way so as to avoid the financial repercussions of its infringement.

Chapter Three : The harmonised judicial conditions governing the payment of compensation under Francovich.

3.1. The solution of minimum harmonisation with regard to the conditions for the operation of the doctrine : One of the most challenging questions encountered under *Francovich* concerned the determination of the substantive conditions for the imposition of the obligation to pay damages from the national treasury for the illegal activity of the domestic authorities. The existence of any right to reparation almost always presupposes the satisfaction of three essential conditions.[1] These are the suffering of some kind of damage by the applicant, the proof that the conduct of the defendant violates the principle of legality[2] and the establishment of some kind of link between the breach committed by the alleged wrongdoer and the loss sustained by the plaintiff. However, it was not immediately apparent whether it should be for each domestic legal order to identify the exact content of these conditions in the *Francovich* field and to determine the kind of conduct that would have to be exhibited by the defendant, in order to give rise to the establishment of public liability. Closely linked to the above was the question of whether it was actually possible to subject the rights of individuals under *Francovich* to more favourable liability standards than the ones provided for at national level with regard to similar domestic law claims.

Theoretically, there were three alternative solutions that could be possibly given in this respect. The first one would be to proceed to the introduction of

[1] In this respect, see the Opinion of Advocate General Tesauro in Cases C-46 & 48/93, *Brasserie du Pêcheur v. Germany and R. v. Secretary of State for Transport ex parte Factortame* [1996] ECR I-1029, at point 53.

[2] Save in those cases where liability is imposed even for loss sustained by the lawful activity of the national authorities. In France, the payment of damages for legislative acts is established exclusively under an objective liability regime on the basis of the principle of *égalité devant les charges publiques*. In Belgium, liability can be accepted exceptionally even for lawful public activity on the basis of the principle of *égalité des citoyens devant la charge de la vie en société*. In Germany, liability in the absence of illegality can be established exceptionally on the basis the *Sonderopfertheorie* (adequate compensation should be offered, when the activity of the public authorities results in certain individuals sustaining excessive damage) and the *Schwellentheorie* (damages should be paid, when the effects of the adopted act on certain persons are so severe that surpass the limits of the restrictions that can be imposed upon them without the payment of compensation). A genuine system of objective public liability is established in Spain, where the payment of damages does not depend on the existence of illegality but merely on proof of the special nature of the loss sustained by the plaintiff (Articles 9(3) and 106(2) of the Constitution and Article 139 (1) of the Law of 26 November 1992 on the legal system for the public administration and administrative procedure). In many legal systems, compensation can also be sought exceptionally on the basis of the so-called risk liability, the operation of which is not based on the illegality of the conduct of the public administration but rather on the exceptional risks that certain activities taken in the public interest entail for specific individuals. For more on this point, see Bronkhorst : 'The valid legislative act as a cause of liability of the Communities', in Heukels/McDonnell (eds.) : *The Action for Damages in Community Law*, Kluwer 1997, pp. 153-165, especially pp. 155-160.

Francovich as a principle applying regardless of the capacity in which the defendant has violated its respective public duties, entrusting exclusively to the national legal orders the determination of the substantive conditions under which the right of individuals to receive damages would arise. The second one would be to extend the judicial intervention even in the establishment of the necessary criteria for the application of the doctrine of governmental liability. In the latter case, such an intervention could take either of the following forms. It could possibly lead to a complete harmonisation, through the introduction of a uniform standard that would apply regardless of the degree of protection already available to individuals by virtue of their relevant national law provisions. Such a development would not be entirely unprecedented in the field of remedies, since a similar step had already been taken in the past with regard to the provision of interim relief against the application of national measures based on allegedly unlawful legislation adopted by the political institutions.[3] It would also be possible to establish a minimum harmonisation, by imposing a set of requirements that would apply only to the extent that national law would not prescribe more favourable conditions for the receipt of compensation by the applicant. In practice, however, the answer that should be given to this specific problem was actually determined by the nature of *Francovich* as a principle arising not from a concrete legal basis but rather from an implicit legal authorisation given in order to fill in a gap in the system of protection of the legal rights of individuals.

It will be recalled that the *Francovich* doctrine is founded upon the twin principles of effectiveness and effective judicial protection.[4] This has the practical consequence that any discretion left as to the determination of the substantive conditions for its application is both defined and limited by the objectives pursued by these two principles. On the one hand, this rules automatically out of the question the possibility of entrusting the matter exclusively to the national legal orders. To do so would often lead to the practical negation of any protection to the suffering individuals, given the very stringent conditions that apply for certain types of public liability in the majority of the domestic legal systems and the even absolute absence

[3] Cases C-143/88 & 92/89, *Zuckerfabrik Süderdithmarschen AG v. Hauptzollampt Itzehoe* [1991] ECR I-415, Case C-465/93, *Atlanta Fruchthandelgesellschaft mbH v. Bundesampt für Ernährung und Forstwirtschaft* [1995] ECR I-3761.
[4] Cases C-6 & 9/90, *Francovich and Bonifaci v. Italy* [1991] ECR I-5357, par. 33.

of any relevant rules in certain of them.[5] At the opposite end, it does not seem possible to proceed judicially to a complete harmonisation of the relevant public liability standards. The principle of effectiveness certainly limits the autonomy of the national legal orders with regard to the determination of the conditions for the payment of compensation from the public funds in actions brought on the basis of *Francovich*. It also justifies the application of more favourable criteria than the ones governing purely domestic law claims, when the national standards do not live up to the effectiveness requirements. However, in the absence of legislative intervention in the field under consideration, it is not permissible to proceed to the disapplication or reformation of the national conditions on governmental liability regardless of the degree of remedial protection that they actually offer to the infringed legal rights of the applicant. This can only be accepted, when there exists the need to elevate the applicable national standard to the level required by the effectiveness mandates.

Thus, it is only a minimum harmonisation that can be established at present with regard to the conditions for the application of *Francovich*. This practically means that the only uniformity that can be guaranteed in this field concerns the determination of the minimum level of protection that should be made available to those claiming damages in liability actions brought under the doctrine. Any judicial conditions introduced in this respect can only apply to the extent that there do not exist at national level any more favourable standards for individuals. There is thus no restriction imposed as to the maximum level that such a protection may reach in the context of a given domestic legal system. In case, however, that the standard applicable for similar domestic law claims exceeds the minimum *Francovich* requirement, the national courts are not left with the discretion to decide whether they will apply it or not to actions brought under the doctrine. They are rather obliged to extend it to them.

It will be seen that this solution of minimum judicial harmonisation is indeed the one chosen with regard to the determination of the substantive conditions for the application of the doctrine of governmental liability. What the case law is doing in practice is to leave some degree of autonomy to the national legal orders and to

[5] *Supra* 2.2.

define itself what it considers as the absolute minimum of effective remedial protection. At the same time, it renders the existence of more favourable national standards subject to the principle of equivalence. While the measure of protection that should be made available under *Francovich* is not thus bottomless, the cover is kept nevertheless open for the domestic legal orders to place it at the appropriate for them level.

3.2. The impact of the conditions governing the payment of damages from the political institutions : From the moment it is accepted that a certain degree of judicial intervention is indeed justified for the purpose of establishing a minimum harmonisation in the field under consideration, an important number of questions arise. One of them concerns the extent to which the Treaty conditions that govern the imposition of liability on the institutions must constitute a point of reference for the judicial determination of the respective criteria also in the *Francovich* area. The examination of the links that exist between the two liability regimes has been made so far basically for the purpose of ascertaining whether the justifications for the restriction of the liability of the defaulting institutions hold equally good also with regard to breaches committed by the national authorities, so as to require something more than the mere illegality for the imposition under *Francovich* of the obligation to pay damages to the suffering individuals. It is submitted that such an approach is rather limited in scope and that it is thus necessary to extend the ambit of the relevant examination to the totality of the conditions that govern the imposition of public liability, including those on issues such as damage and causality.[6]

Both the national authorities and the political institutions are placed under the duty to respect the obligations that they have undertaken towards individuals. Generally thus, their relationship with the latter should be governed by uniform rules and their activity should be subjected accordingly to the same restrictions. This constitutes an application of the rule of law, that prohibits the recognition in favour of the public authorities of privileges and immunities that are not justified on an

[6] Van Gerven : 'Taking Article 215 (2) EC Seriously', in Beatson/Tridimas (eds.) : *New Directions in European Public Law*, Hart Publishing 1998, pp. 35-47, p. 39.

objective basis.[7] That this is indeed so had been already become apparent from the case law on the provision of interim protection against allegedly illegal public activity. It was apparently a similar need to guarantee the coherence of the legal protection of individuals, that led to the transposition of the conditions that govern the order of interim relief against the political institutions to national legislation giving effect to allegedly unlawful measures adopted in the context of the Treaty.[8]

From a political point of view, an alignment of *Francovich* with the conditions that govern the payment of damages from the Community would certainly facilitate the acceptance of the new doctrine at domestic level and ease the concerns of those expressing a certain degree of scepticism as to its legitimacy.[9] The national governments had clearly warned that their liability should not be subjected to more flexible criteria, than those applicable with regard to breaches committed by the political institutions.[10] Suffice it also to recall at this point the early position put forward by a considerable part of the doctrine, that *Francovich* entailed extremely severe repercussions for the national treasuries which could be contrasted with the much more lenient treatment that was afforded to the Community for the payment of damages to those affected by the illegal activity of its organs. This was seen as amounting to the introduction of a double liability standard, that operated in favour of those wishing to claim damages against the domestic authorities.[11]

The starting point should thus be that, for both legal and political reasons, breaches attributed to the national authorities and the political institutions should be treated alike. This certainly holds true also with regard to the determination and application of the conditions for the payment of compensation to the suffering individuals. However, it needs to be kept in mind that the two liability regimes are based on different foundations. The one emanates from the general principles on public liability common to the national legal orders, while the other exists as a consequence of the hierarchical relationship between national and Community law

[7] That the Community is governed by the rule of law was declared in Case 294/83, *Les Verts v. European Parliament* [1986] ECR 1339, par. 23. This has been reaffirmed in *Opinion 1/91 (EFTA Draft Agreement)* [1991] ECR I-6079, par. 21

[8] *Zuckerfabrik Süderdithmarschen* : *op cit.* No 3, *Atlanta* : *op cit.* No 3.

[9] In Germany, it was even argued that the *Francovich* decision had been adopted *ultra vires* and that it should be thus disregarded by the courts. In this respect, Cornils : *Der gemeinschaftsrechtliche Staatshaftungsanspruch*, Baden-Baden Nomos 1995, p. 256.

[10] In this respect, see especially the observations of the intervening governments in *Brasserie/Factortame III* : *op cit.* No 1.

[11] Caranta : 'Judicial protection against Member States : a new *jus commune* takes shape', (1995) 32 *CMLRev* 703.

and the operation of the principle of supremacy.[12] The question is thus whether this can possibly justify the differentiated treatment of individuals bringing damages claims under them. Accepting no privileges for anyone has also the meaning that it might be exceptionally necessary to apply differentiated standards, in order to take account of the differences that might exist either in the functions performed by the various public authorities or in the circumstances under which the latter exercise the duties that have been entrusted to them. To adhere in such a case to a rigid concept of equality of treatment would practically amount to the equal treatment of unequal situations and to the indirect recognition of privileges in favour of the one or the other category of public authorities. It is thus particularly important to ascertain whether the application of such a differentiated approach is indeed justified in the field under consideration, with regard to any of the conditions for the imposition of public liability.

There does not seem to exist any particular reason why the existence of damage and causation should be determined in a different way, depending on the nature of the authority that committed the breach. Both the loss suffered by the applicant and its direct link with a given violation constitute concepts, the content of which is determined according to objective criteria and without the need to refer for this purpose either to the nature of the functions performed by the defendant or to the circumstances under which the latter is called upon to exercise its duties. Controversy can thus exist only with regard to the determination of the type of conduct that has to be exhibited by the alleged wrongdoer, in order for damages liability to arise. It seems indeed reasonable to require a variable degree of culpability on the part of the defaulting authority, depending on the nature of the functions it is entrusted with and the kind of difficulties encountered by it in the performance of its powers. The crucial question is thus whether the circumstances under which the national authorities and the political institutions operate are to such an extent different, as to justify their being made subject to diverse culpability standards for the establishment of their liability.

[12] *Supra* 2.2.2.2.

3.2.1. The discretion factor as the reason for the restriction of Community liability : A differentiated standard of liability has been introduced with regard to breaches attributed to the political institutions, depending on the nature of the activity giving rise to the loss of the applicant.[13] The general rule is that proof of illegality suffices for the receipt of compensation.[14] This does not mean that the payment of damages is subjected necessarily to a strict standard, in the sense of liability arising regardless of the existence of some kind of culpability on the part of the defendant institution. The case law often appears to require something more than the mere violation of the principle of legality[15] and the language of fault makes sometimes its appearance in the relevant judicial declarations.[16] Even when compensation seems to be paid on the basis of a standard of illegality *per se*, there exists at the background a certain degree of culpability on the part of the wrongdoer.[17] The concept of illegality can be in fact given a wide range of interpretations, most of which embrace elements of variable degrees of fault. In the majority of the cases, the unlawfulness of a given act or omission will suffice thus for the establishment of the existence of some kind of reprehensible behaviour on the part of the wrongdoer. The matter continues, however, to divide the doctrine.[18]

Special considerations apply, when the loss of the applicant is due to legislative measures involving choices of economic policy. In such a case, the payment of damages requires proof of a sufficiently flagrant violation of a superior rule of law for the protection of the individual.[19] Under this *Schöppenstedt* formula, the mere existence of illegality is not enough for the imposition of liability. The

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[13] However, see *infra* 5.4. on the developments that have taken place in this respect following the decision in Case C-352/98 P, *Laboratoires Pharmaceutiques Bergaderm and Goupil v. Commission* [2000] ECR I-5291.

[14] Case 4/69, *Lütticke v. Commission* [1971] ECR 325, par. 10, Case T-336/94, *Efisol SA v. Commission* [1996] ECR II-1343, par 30, Cases T-149 & 181/94, *Kernkraftwerke Lippe-Ems GmbH v. Commission* [1997] ECR II-161, par. 155, Cases T-213/95 & 18/96, *Stichting Certificatie Kraanverhuurbedrijf and Federatie van Nederlandse Kraanverhuurbedrijven* v. Commission [1997] ECR II-1739, par. 39, Case T-230/95, *BAI v. Commission* [1999] ECR II-123, par. 29.

[15] Cases 19, 20, 25 & 30/69, *Denise Richez-Parise and others v. Commission* [1970] ECR 325. The adoption of an incorrect interpretation of the law did not constitute in itself a wrongful act but the delay of the department in rectifying the information given to the plaintiffs established the existence of illegality.

[16] Case T-575/93, *Casper Koelman v. Commission* [1996] ECR II-1, par. 96 and 98, Case T-108/94, *Elena Candiotte v. Council*, [1996] ECR II-87, par. 54, Cases T-185, 189 & 190/96, *Riviera auto service établissements Dalmasso SA v. Commission* [1999] ECR II-93, par. 90, Case T-277/97, *Ismeri Europa Srl v. Court of Auditors* [1999] ECR II-1825, par. 100.

[17] For example, Case 145/83, *Stanley George Adams v. Commission* [1985] ECR 3539. Although no explicit reference was made to the culpability of the defendant, it was obvious that its conduct had been negligent.

[18] For example, see Schockweiler/Wivenes/Godart : 'Le régime de la responsabilité extra-contractuelle du fait d'actes juridiques dans la Communauté européenne', (1990) 26 *RTDE* 27 and Couzinet : 'La faute dans le régime de la responsabilité non contractuelle des Communautés européennes', (1986) 22 *RTDE* 367.

[19] Case 5/71, *Aktien-Zuckerfabrik Schöppenstedt v. Council* [1971] ECR 975, par. 11.

applicant is rather obliged to meet a much more stringent standard. In order for the existence of such a sufficiently serious breach to be established, the plaintiff must prove that the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers.[20] This has been sometimes interpreted as meaning that the conduct of the defendant should be verging on the arbitrary.[21] The reasons for the adoption of such a restrictive approach are the same as those put forward for the restriction of the liability of the public authorities for breaches committed in the exercise of their normative functions under national law. The legislative authorities should not always be hindered in making their decisions by the prospect of damages suits, whenever they have the occasion to adopt legislative measures in the public interest, which may adversely affect the interests of individuals.[22]

Indeed, the position of the political institutions in the performance of their legislative duties is comparable to that of the national legislature. They are entrusted with the duty of formulating policies, making political assessments and reconciling conflicting interests. Their action is only determined by the provisions of the primary legislation and the general principles of law. The exercise of their normative functions affects inevitably the general public, creating winners and losers. If everybody adversely affected by this regulatory activity was thus entitled to receive compensation, the danger would arise automatically of incurring indefinite liability. This would not only burden excessively the Community treasury, but would also deter the political institutions from the exercise of their legislative duties. The end result would be a possible delay of the legislative process, in order to seek extensive legal advice. This would lead to the non-adoption of many socially beneficial policies, that would affect certain powerful economic interests. This would certainly have adverse effects for the interests of the general public. The imposition thus in such circumstances of a rather stringent liability standard is necessary, so as to

[20] Cases 83 & 94/76, 4, 15 & 40/77, *Bayerische HNL Vermehrungsbetriebe GmbH & Co. KG v. Council and Commission* [1978] ECR 1209, par. 6.
[21] Cases 116 & 124/77, *Amylum NV and Tunnel Refineries Ltd. v. Council and Commission* [1979] ECR 3497, par. 19. In Case C-220/91 P, *Commission v. Stahlwerke Peine-Salzgitter* [1993] ECR I-2393, par. 51, it was declared that arbitrary conduct on the part of the defaulting institutions is not a precondition for the establishment of their liability. However, see Cases T-481 & 484/93, *Vereniging van Exporteurs in Levende Varkens and another v. Commission (Live Pigs)* [1995] ECR II-2941, par. 128, where the language of arbitrariness made again its appearance in the relevant judicial pronouncements.
[22] *HNL : op cit.* No 20, par. 5.

prevent what is often referred to as the phenomenon of the over deterrence of the public authorities in the performance of their legislative powers.

It is obvious that what underlies the application of the *Schöppenstedt* formula is the great margin of discretion enjoyed by the political institutions and the complexity of the situations that they have to deal with in the exercise of their normative functions.[23] This also explains why it should be the substance and not the form of the contested measure that should determine the applicable conditions for the receipt of compensation by the plaintiff. Even if the act allegedly constituting the source of the loss complained of is in the form of an individual measure, it should still be subjected to the restrictive liability standard, if it arises that it is legislative in nature and has been adopted in the exercise of a wide discretionary power.[24] The general conditions for the imposition of liability for administrative acts should rather apply, whenever the adoption of the contested normative measure did not involve difficult policy choices and assessments on the part of the defaulting institution.[25] The question is thus whether this discretion factor can lead to the introduction of similar restrictions, also with regard to the establishment of governmental liability for breaches attributed to the national authorities. There are two basic issues arising in this respect. In the first place, it is wondered whether the discretion enjoyed by the domestic authorities in the field under consideration is quantitatively and qualitatively the same as the one possessed by the political institutions in the exercise of their normative duties. It is further asked whether the absence of

[23] Indicatively, *HNL* : *ibid.*, par. 5, *Live Pigs* : *op cit.* No 21, par. 81, *Brasserie/Factortame III* : *op cit.* No 1, par. 43. Also see Goffin: 'A propos des principes régissant la responsabilité non contractuelle des Etats Membres en cas de violation du droit communautaire', (1997) 33 *CDE* 531, at p. 547. He provides a triple justification for the restriction of Community liability. He refers to the discretionary power enjoyed by the defaulting institutions, the great extent of this power and their obligation to give effect with a great freedom to the common policies entrusted to them by the Treaty.

[24] For example, *Live Pigs* : *ibid.*, par. 81-82. It was examined whether the contested decisions were in fact legislative in nature and whether they had been adopted in the exercise of wide discretionary powers. An affirmative answer was given to both questions. Also see Cases T-480 & 483/93, *Antillean Rice Mills and others v. Commission* [1995] ECR II-2305. The contested decision applied to any importer of Antillean rice and the Commission enjoyed a wide discretion in the field under examination. In the same direction, Case T-390/94, *Aloys Schröder v. Commission* [1997] ECR II-501. Two decisions imposing a ban on the export of pigs from Germany were found to be legislative in nature because of their general nature and their discretionary character. In all these cases, the restrictive liability standard had thus to be satisfied.

[25] Van der Woude : 'Liability for administrative acts under Article 215 (2) EC', in Heukels & McDonnell (eds.) : *op cit.* No 2, pp. 109-128, at p. 113 refers to Cases 44 to 51/77, *Union Malt v. Commission* [1978] ECR 57, Cases 279, 280, 285 & 286/84, *Rau v. Commission* [1987] ECR 1069, Case 27/85, *Vandemoortele v. Commission* [1987] ECR 1129 and Case 265/85, *Van den Bergh en Jurgens v. Commission* [1987] ECR 1155. In those cases, the Court did not apply *Schöppenstedt* to actions for damages sustained due to the adoption of Regulations implementing other Regulations and not entailing thus the exercise of wide discretionary powers. In the same respect, also see Case T-178/98, *Fresh Marine Company AS v. Commission* [2000] ECR II-3331. The plaintiff sought damages for the application against it of anti-dumping measures on the basis of Regulation No 2529/97. It was found that the adoption of those measures had taken place in the context of an administrative operation, which did not entail the making of difficult policy choices and which conferred only limited discretion on the defendant.

discretion in a given case should open the door automatically to the application of a strict liability standard under *Francovich.*

3.2.2. The difficulties encountered by the domestic authorities in the application of the law as a reason for the restriction of their Francovich liability : It is only exceptionally that the defendant under *Francovich* may have been called upon to make policy choices similar to those that justify the application of the restrictive liability standard under *Schöppenstedt.* The domestic authorities are not given the power to formulate common policies, but they are rather obliged to give effect to those already adopted by the political institutions. They do not create law for the first time, but they rather apply and enforce the provisions of both the primary and the secondary legislation. There are circumstances, where they are obliged to proceed in a certain way without having any latitude to decide whether to act or abstain from acting. In many cases they are placed under the obligation to attain a certain result, the only freedom of action left to them concerning the choice of the form and method through which they will do so. They are given sometimes the power to derogate from the application of legally binding measures, but the extent of their discretion to do so is determined by specific legal provisions and the relevant case law. The choice as to whether a certain policy should be adopted and the decision as to the appropriateness of a given legal measure has already been taken at a superior level. The domestic authorities are not called upon to make any difficult policy choices in this direction, but they are rather placed under the absolute duty to comply with a tightly drawn web of legal obligations. Any discretion left to them is not legislative in nature, at least not in the strict sense used with regard to the liability of the political institutions. It is rather an operational and interpretative discretion to decide the best way to give effect to binding legal policies. It is different in nature and in extent from the one that justifies the restriction of liability under *Schöppenstedt.*[26]

[26] In this direction, see especially Steiner : 'The Limits of State Liability for Breach of European Community Law' (1998) 4 *EPL* 69, pp. 98 *et seq.*, Tridimas : 'Member State Liability in Damages for Breach of Community Law : An Assessment of the Case Law', in Beatson/Tridimas (eds.) : *op cit.* No 6, pp. 11-33, at pp. 22-24, Van Gerven : 'Non-contractual liability of Member States, Community Institutions and Individuals for Breaches of EC Law with a View to a Common Law for Europe', (1994) 1 *MJ* 6, pp. 37-38, Gravells : 'State liability in damages for breach of European Community Law', [1996] 41 *PL* 567, pp. 575-577.

The conclusion thus arises that, save in exceptional cases, the discretion factor may not be put forward to justify the imposition of restrictions on the payment of *Francovich* damages. There have certainly been instances, where the restrictive liability regime has been applied even to measures which were not actually legislative in nature and which did not consequently involve a great margin of discretion in their adoption by the defendant institution.[27] However, the mistaken application of *Schöppenstedt* in a given legal area may not possibly serve as an argument for its transposition in the field of governmental liability, in circumstances that do not involve the making of difficult policy choices by the wrongdoer. What needs to be determined is rather whether there might exist alternative justifications that operate beyond the discretion criterion and which can be used to deny the introduction of a strict liability standard under *Francovich*. In case of an affirmative answer, it will have to be ascertained whether the restriction of governmental liability should be attempted on the basis of the same test that applies under *Schöppenstedt* or whether a more qualified approach is appropriate to take account of the particularities in the position and functions of the domestic authorities.

It is submitted that policy reasons based on the need to achieve administrative efficiency and to avoid the over deterrence of the public actors in the performance of their normative functions hold equally good also with regard to the operation of the doctrine of governmental liability. This is not, however, because the domestic authorities are called upon to make difficult policy choices in the field under consideration. It is rather because it is not always clear what they should do, in order to comply with the obligations that they have been entrusted with. Indeed, many provisions are drafted in a vague and imprecise way and are open to a number of different interpretations. If a reasonable interpretation is adopted and an appropriate level of care is shown by the competent domestic authority, then any responsibility for the fact that the chosen construction is not actually correct lies principally with the primary legislature that failed to clarify what it actually had in

[27] Indicatively, Case C-152/88, *Sofrimport Sàrl v. Commission* [1990] ECR I-2477. The case concerned a Regulation, which was in essence an individual act. It was merely implementing another Regulation, that had been adopted in order to give effect to the basic Council Regulation. It was nevertheless decided that the restrictive liability conditions for legislative acts should apply. In the same respect, Case C-282/90, *Vreugdenhil v Commission* (*Vreugdenhil II*) [1992] ECR I-1937. The Court treated the contested measure as legislative, although Advocate General Darmon had argued that the defendant institution did not enjoy a great margin of discretion and was not called upon to make difficult policy choices in its adoption.

mind. Given also the continuously developing nature of the law in this area and the uncertainty that surrounds its exact scope of application, it is often difficult to determine what is actually permitted and prohibited under it. The intervention thus of the Court will often be required, in order to clarify the situation. This will also be so in all those cases, where the generality of the provisions of the primary and the secondary legislation leaves much scope for judicial determination. No matter therefore what the degree of diligence shown by the domestic authorities actually is, there will always be cases where the judicial construction eventually given to a specific legal norm will differ from the one already adopted by them.

The bottom line is that the public authorities are often faced with an uncertain standard as to what the limits of their operational discretion and the extent of their legal obligations might possibly be. To accept that financial liability should arise in any case that a misinterpretation of the law causes loss to individuals would be unfair for them and could potentially lead to their over deterrence from the performance of their functions, through the adoption of an inefficiently high level of care and their hesitation to adopt socially beneficial but privately costly policies. This would have adverse effects for the general public, exactly as in the case of the imposition of unlimited liability on the political institutions for breaches committed in the exercise of their normative duties. It could thus be argued that strict liability should only arise, when the violation concerns a legal provision or principle which is either clear and unambiguous in itself or the content of which has been determined beyond doubt through the case law.[28] In the absence of such a clarity, the payment of *Francovich* damages should not be ordered automatically for the adoption of mistaken legal interpretations which are nevertheless reasonable and have been taken in good faith. The opposite could be seen as a violation of the principle of legal certainty. It could even be argued that individuals do not acquire legitimate expectations, until clarity has been established in a given field of law.[29]

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[28] In this direction, Craig (a) : 'Francovich, Remedies and the scope of damages liability', (1993) 109 *LQR* 595, at pp. 610 *et seq.*, Craig (b) : 'Once more unto the breach : The Community, the State and damages liability' (1997) 113 *LQR* 67, at pp. 79 *et seq.*, Van den Bergh and Schäfer : 'State Liability for Infringement of the EC Treaty : Economic Arguments in Support of a Rule of "Obvious Negligence"', (1998) 23 *ELRev* 552, especially pp. 560 *et seq.*, Steiner : *op cit.* No 26, pp. 98 *et seq.*, Prechal : *Directives in EC Law : A Study on EC Directives and their Enforcement by National Courts*, OUP 1995, pp. 320-321 and 323-324. Also see the Opinion of Advocate General Tesauro in *Brasserie/Factortame III* : *op cit.* No 1 and Case C-392/93, *R. v. HM Treasury ex parte BT* [1996] ECR I-1631, at points 69 and 35 respectively.

[29] Steiner : *ibid.*, p. 104.

It should not further matter whether the breach has been committed by the executive, the legislature or the judiciary. The same interpretative problems are encountered by the totality of the national authorities and the form in which public activity is exercised may be entirely fortuitous. For example, consider a Directive that is drafted in such an ambiguous and unclear way that leaves much uncertainty as to the interpretation that should be given to its provisions. It should not make a difference in such circumstances whether the loss complained of by the applicant is actually due to its misimplementation by the legislature or to its misapplication by the executive. In both cases, the breach committed is due to the unclarity of the law and the wrongdoer should be treated the same regardless of its status and position in the national legal order.[30] The mere proof of illegality should thus suffice for the imposition of governmental liability in all those cases where the breach has taken place in areas, where the defaulting authority was neither called upon to make difficult policy choices nor was it placed in any kind of uncertainty as to the exact limits of its legal obligations. The situation will not be different from the one governing the liability of the defaulting institutions outside the field of application of the *Schöppenstedt* formula. Indeed, the clarity of the law in the field where the violation has occurred establishes a strong inference that there exists a certain degree of culpability on the part of the defendant. On the contrary, when the breach has taken place in an area where the domestic authority concerned enjoys exceptionally a wide margin of discretion or in which the state of the law is not clear, policy concerns would seem to militate in favour of the application of a more restrictive culpability standard.

However, it is not immediately apparent whether there should be a differentiation of the applicable test depending on whether the violation concerns the making of difficult policy choices or the misinterpretation of binding legal rules. This is because there does not exist unanimity on whether the measure of difficulty involved for the public authorities in the performance of their duties in each of these two areas is in fact the same. If the difficulties encountered by them are indeed comparable, their liability should be subjected accordingly to the same restrictive

[30] In this respect, see Wyatt : 'Damages against the State for Breach of EC Law', (1998) 9 *Lawyers' Europe* 6, at p. 7.

standard. If the interpretation of legal rules is an easier task than the formulation of common policies, then the application of a more lenient standard in the former field would be appropriate. It could be argued that there is indeed a difference between adopting the law for the first time and giving effect to it through the interpretation of its provisions. The doctrine appears divided on this point.[31] It might be better to apply the same criteria in both areas, introducing a differentiated approach as to their assessment and accepting that the relevant test might be met more easily when the breach involves the misinterpretation of the law rather than the erroneous exercise of wide discretionary powers.

3.2.3. Concluding remarks : Given the limited degree of judicial harmonisation that can currently take place under *Francovich*, the transposition in this field of any criteria that have already been developed in related legal areas can only constitute the minimum standard of protection that should be made available to individuals wishing to claim damages from the national funds.[32] By virtue of the principle of equivalence, they should be allowed to give way in any case that national legislation provides for more lenient conditions with regard to similar domestic law breaches.[33] Account should also be taken of the fact that heavy criticism has often been exercised against the extremely restrictive way, in which the test for the payment of damages under *Schöppenstedt* has been applied in practice. It is thus submitted that the transposition of the relevant solutions in the field of governmental liability should only take place to the extent that it does not nullify in practice the protection offered by *Francovich* to the legal rights of individuals. To give an example, the fact that the restrictive liability regime has been applied even to measures which were not adopted in the exercise of wide discretionary powers by the defaulting institutions should not lead to the adoption of a similar approach also with regard to

[31] For example, Craig (a) and (b) : *op cit.* No 28, pp. 613 and 82-84 argues that the degree of difficulty involved in the two fields is in fact the same. The opposite argument is put forward by Van Gerven : 'Bridging the unbridgeable : Community and national tort laws after Francovich and Brasserie', (1996) 45 *ICLQ* 507, at pp. 528-529 and Gravells : *op cit.* No 26, pp. 576-577. A more cautious approach on the point is adopted by Steiner : *op cit.* No 26, pp. 98 *et seq.* She acknowledges the different justifications for the restriction of liability in the two fields and accepts that a more or less restrictive approach might be justified with regard to the interpretation of legal rules.

[32] See in this respect the Opinions of Advocates General Mischo in *Francovich* : *op cit.* No 4 and Léger in Case C-5/94, *R. v. Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas* [1996] ECR I-2553, at points 72 and 144 respectively.

[33] *Brasserie/Factortame III* : *op cit.* No 1, par. 66.

breaches attributed to the domestic authorities.[34] This would oblige the applicants to meet a very restrictive standard, in circumstances where a more qualified approach would be appropriate. What should be realised is that it is not a one way process that we are dealing with here. If the need exists to subject individuals to similar standards regardless of the status of the authority responsible for the breach, this does not mean necessarily that *Francovich* should be aligned automatically with the entirety of the solutions introduced for the payment of damages by the political institutions.[35] The opposite is also possible, so as to talk about a mutual influence between the two closely related regimes of public liability.[36]

3.3. The harmonised conditions for the establishment of Francovich liability :
The breaches that may give rise to the payment of damages under the doctrine may vary considerably in form, nature and intensity. By taking as a criterion the circumstances under which they have occurred, they can be classified in two general categories. There are infringements taking place in areas, where the domestic authorities enjoy exceptionally a wide margin of discretion comparable to the one possessed by the political institutions in the performance of their rule making functions. There also exist violations committed in fields where the only discretion left is either operational or interpretative in nature, confined to the determination of the best possible way to give effect to binding policies that have already been decided and formulated at a higher level. The latter category can be further analysed into two further categories, on the basis of the degree of clarity existing in the legal area where the breach has been committed and the measure of precision characterising the language of the infringed provision. Many alternative classifications are also possible, making it thus necessary to work out a way to differentiate between the different breach scenarios that may arise in practice.[37]

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[34] Against the application of *Schöppenstedt* to normative measures that do not involve significant policy choices, see Barav & Vandersanden : *Contentieux communautaire*, 1977, p. 336, Joliet : *Le contentieux des Communautés européennes*, Liège 1981, p. 270 and Barav : 'Fonction juridictionnelle', *in La révision du Traité sur l'Union européenne: perspectives et réalités*, Pédone 1996, p. 110. Also see the Opinions of Advocates General Tesauro in *Brasserie/Factortame III* : *op cit.* No 1, Léger in *Hedley Lomas* : *op cit.* No 32 and Darmon in *Vreugdenhil II* : *op cit.* No 27, at points 65, 135 and 51 respectively.
[35] In this respect, see the Opinion of Advocate General Léger in *Hedley Lomas* : *ibid.*, par. 145.
[36] *Infra* 5.4.
[37] For example, Van Gerven : *op cit.* No 31, p. 521 distinguishes between five types of violations. These range from breaches of duty *simpliciter* to breaches committed in the exercise of wide discretionary powers.

There were two basic ways that such a result could be possibly attained. It would be possible to require the satisfaction of different conditions, depending on the nature of the breach that gave rise to the loss of the plaintiff. The alternative solution would be to introduce a single test, the application of which would be flexible enough to take account of the particularities of the different kinds of violations attributed to the domestic authorities.

The initial impression created by *Francovich* was that preference had been given to the former solution. It was clearly declared that the conditions under which individuals would be given a right to reparation would depend on the nature of the breach giving rise to the damage allegedly sustained by them.[38] It was then added that, when the violation consists in the failure of the domestic authorities to adopt in time the necessary national implementing legislation, the payment of compensation will depend on the satisfaction of three conditions. The result prescribed by the measure should entail the grant of rights to individuals, it must be possible to identify the content of these rights on the basis of the provisions of the measure itself and there must exist a causal link between the breach complained of and the loss sustained by the applicant.[39] What is striking in this judgment is the absence of any reference to the concept of culpability. This led many academic commentators to argue that the transposition in the field of governmental liability of the conditions that govern the payment of compensation for the illegal activity of the defaulting institutions had in fact been rejected.[40] If that was indeed so, it would practically mean that liability under *Francovich* would be established on a strict basis without the need to show any kind of fault on the part of the defendant. However, a closer examination of the relevant statements and the circumstances under which they were made leads to completely different conclusions.

In *Francovich* itself, it was opined that it would generally be appropriate to subject to the same standards the liability arising from the unlawful activity of the political institutions and the national authorities.[41] It was nevertheless doubted

[38] *Francovich* : *op cit.* No 4, par. 38.
[39] *Ibid.*, par. 39-40.
[40] For example, see Curtin : 'State Liability under EC Law : A New Remedy for Private Parties', (1992) 21 *ILJ* 74, at p. 80, Caranta : *op cit.* No 11, p. 724 and Mouameletzi : 'State liability for breach of EC law and the right of individuals to damages', (1993) 13 *EEED* 371, at p. 387.
[41] Opinion of Advocate General Mischo in *Francovich* : *op cit.* No 4, at points 70 *et seq.*

whether the sufficiently serious breach of a superior rule of law condition ought to apply on the facts of that case, given that violations consisting in the total failure to adopt implementing legislation do not involve the exercise of discretionary powers as to necessitate the application of such a stringent standard.[42] It was further argued that the existence of a flagrant breach should always be considered as met, when the omission of the domestic authorities to proceed to the required implementation in national law has been already established under the public enforcement mechanism.[43] Thus, it could very well be the exceptionally clear nature of the seriousness of the breach committed in *Francovich* that made it unnecessary to make any reference in that case to the need to prove anything more than the mere perpetration of the violation by the defendant.[44] After all, the fact that the applicable conditions were supposed to differ depending on the nature of the breach left open the possibility that more stringent standards might apply in the future with regard to different factual scenarios.

Subsequent case law has shed light in this regard. In *Brasserie/Factortame III*, the violation concerned directly effective provisions on free movement of goods and freedom of establishment. It was declared that the conditions under which the obligation to pay damages would arise should not differ in the absence of particular justification from those governing the liability of the political institutions in like circumstances.[45] The case was then distinguished from *Francovich*, in which the violation concerned the failure to attain a specific result.[46] It was further added that the national authorities do not have systematically a wide discretion, when they act in a field covered by the scope of the Treaty.[47] Notwithstanding this fact, it was concluded that there are exceptional cases where the wrongdoer operates with a considerable freedom of action, comparable to that of the political institutions in the implementation of common policies.[48] The obligation to pay damages in such

[42] *Ibid.*, at point 76.
[43] *Ibid.*, points 33 (point 5 of the summary) and 76.
[44] Temple Lang : 'New Legal Effects Resulting from the Failure of States to Fulfill Obligations under European Community Law', [1992-93] 16 *FILJ* 1, p. 18. Also see the conclusions of Advocates General Tesauro in *Brasserie/Factortame III* : *op cit.* No 1, points 57-60 and *BT* : *op cit.* No 28, point 35 and Léger in *Hedley Lomas* : *op cit.* No 32, points 156-157.
[45] *Brasserie/Factortame III* : *ibid*, par. 42.
[46] *Ibid.*, par. 46.
[47] *Ibid.*
[48] *Ibid.*, par. 47.

circumstances presupposes the perpetration by the national authorities of a sufficiently serious breach of a rule of law intended to confer rights upon individuals and the existence of a direct causal link between the breach and the loss sustained by the applicants.[49] In *BT*, these same conditions were extended even to cases of misimplementation breaches. The rationale was that similar policy reasons exist for the restriction of governmental liability, both in the field where legislative action is necessary for the transposition of a measure in the national legal order and in the area where the domestic authorities exercise wide discretionary powers.[50]

It is immediately apparent that the crucial difference between the *Francovich* and the *Brasserie/Factortame III* tests is the reference in the latter to the need to prove the existence of a sufficiently serious breach. In *Dillenkofer*[51], it was confirmed that the applicable criteria were in substance the same in both cases. The condition that there should be a sufficiently serious breach was not mentioned in *Francovich*, but this was due to the fact that the gravity of the infringement complained of by the applicants was evident from the circumstances of that case.[52] It is not thus the conditions themselves that differ depending on the nature of the breach, but rather the way that they are to be applied to each type of situation.[53] A breach is sufficiently serious, if the defaulting national authority has manifestly and gravely disregarded the limits on the exercise of its rule making powers.[54] If the violation has been committed in an area where the wrongdoer was not called upon to make any legislative choices and had only considerably reduced or even no discretion, the mere infringement of the law may be sufficient to establish the existence of a sufficiently serious breach.[55] The conditions that have to be met by the applicant are thus always the same. What differs is the way the existence of a sufficiently serious breach is ascertained. It is usually for the plaintiff to prove that such a violation has actually taken place. In certain circumstances, the mere violation of the law may constitute automatically such a sufficiently serious breach.

[49] *Ibid.*, par. 51.
[50] *BT*: *op cit.* No 28, par. 40.
[51] Cases C-178, 179 & 188 to 190/94, *Dillenkofer and Others v. Germany* [1996] ECR I-4845.
[52] *Ibid.*, par. 23.
[53] Case C-424/97, *Salomone Haim v. Kassenzahnärztliche Vereinigung Nordrhein* [2000] ECR I-5123, par. 36.
[54] *Dillenkofer* : *op cit.* No 51, par. 25.
[55] *Ibid.*

Before proceeding to the examination of the exact content of the above mentioned conditions and to the evaluation of the judicial treatment that they have been subjected to, it is first necessary to ascertain the type of harmonisation that has actually been established in the field under consideration. It is submitted that the standards introduced in this direction are merely minimum, in the sense suggested earlier on. This basically means two things. In the first place, a distinction seems to have been made between two kinds of substantive conditions.[56] The ones which are considered essential for the effective and homogeneous application of the doctrine have been subjected to judicial harmonisation and have been classified as necessary and sufficient to found a right to damages.[57] All the others are still laid down by national law. These must not be more favourable than those relating to similar domestic claims and must not be framed as to make it virtually impossible or excessively difficult to obtain reparation.[58] At the same time, the fact that uniform standards have been set with regard to the necessary and sufficient conditions for the payment of compensation to individuals does not mean that public liability cannot be incurred under less strict conditions on the basis of national law.[59]

3.3.1. The existence of damage : Any liability action rests necessarily on the assumption that the applicant has suffered some kind of financial detriment due to the conduct of the defendant. Little clarification has been offered so far on what the content of the sustained loss should actually be, in order for the payment of compensation under *Francovich* to be possible. In fact, the only clear guidance in this respect has been provided for in connection with the extent of the reparation due. This is a matter concerning basically the quantification of the loss and will be thus reserved for later examination.[60] Given the scarcity of guidance in this area, much room is left inevitably to the national courts to determine the issue according to the respective arrangements of their domestic legal systems.[61] The discretion that

[56] Van Gerven : 'Bridging the gap between Community and national laws : Towards a principle of homogeneity in the field of legal remedies ?', (1995) 32 *CMLRev* 679, at pp. 693-694 makes a distinction between "constitutive" and "non-constitutive" substantive conditions. These are determined by Community and national law respectively.
[57] *Brasserie/Factortame III* : *op cit.* No 1, par. 66.
[58] *Francovich* : *op cit.* No 4, par. 43.
[59] *Brasserie/Factortame III* : *op cit.* No 1, par. 66.
[60] *Infra*, 4.2.3.2(b)(ii).
[61] *Francovich* : *op cit.* No 4, par. 42. Also *Brasserie/Factortame III* : *op cit.* No 1, par. 83.

they enjoy in this respect is nevertheless circumscribed by two factors. The solutions given by them should comply with the principles of effectiveness and equivalence.[62] They are also obliged to make recourse to the relevant case law on the liability of the political institutions, given that there does not seem to exist any reason why the concept of damage should be ascertained differently depending on the nature of the public authority that has infringed its legal obligations. The transposition of the relevant solutions in the *Francovich* field is made nevertheless subject to the absence of more favourable national standards and should not amount in practice to the negation of any effective protection to the suffering individuals.[63]

Having thus regard to what has been accepted with regard to the payment of compensation by the defaulting institutions[64], reparation should be possible for both material and non material damage.[65] The sums awarded to the applicants in the latter case may be entirely symbolic.[66] The loss complained of must generally be actual and certain[67] and not based on facts of an essentially speculative nature.[68] It should be nevertheless possible to order the payment of compensation also for imminent damage foreseeable with sufficient certainty, even if its exact extent cannot be ascertained yet with precision.[69] Indeed, to allow the relevant action as soon as the cause of the damage is certain may protect the plaintiff from incurring further loss as a result of the same violation.[70] An interesting question arising in this respect is whether the payment of compensation should also depend on the gravity of the loss suffered by the applicant and the number of persons affected by a given violation. In other words, it is asked whether the damage should also be serious and special. This requirement has been indeed introduced under *Schöppenstedt* as a further condition that the plaintiffs should meet, in order to prove the perpetration of a sufficiently

[62] *Ibid.*
[63] *Supra* 3.2.3.
[64] For more information on this point, see Toth : 'The concepts of damage and causality as elements of non-contractual liability', in Heukels/McDonnell (eds.) : *op cit.* No 2, pp. 179-198.
[65] Cases 173/82, 157/83 & 186/84, *Castille v. Commission* [1986] ECR 497, Cases 169/83 & 136/84, *Leussink-Brummelhuis v. Commission* [1986] ECR 2801 and Case T-59/92, *Caronna v. Commission* [1993] ECR II-1129.
[66] For example, Case 18/78, *Mrs V. v. Commission* [1979] ECR 2093. It is sometimes concluded that the annulment of the act constitutes sufficient redress for the moral damage sustained. Indicatively in this respect, Case T-52/90, *Volger v. Commission* [1992] ECR II-121, par. 46 and Case T-368/94, *Pierre Blanchard v. Commission* [1996] ECR II-41, par. 126.
[67] For example, see the relevant pronouncements in *Richez-Parise* : *op cit.* No 15, par. 31, Cases 256, 257, 265, 267/80, 51/81 & 282/82, *Birra Wührer v. Council and Commission* [1984] ECR 3693, par. 9 and Case 51/81, *De Franceschi v. Council and Commission* [1982] ECR 117, par. 9.
[68] Cases 5, 7 & 13 to 24/66, *Kampffmeyer and others v. Commission* [1967] ECR 245, p. 266.
[69] Cases 56 to 60/74, *Kampffmeyer and others v. Commission* [1976] ECR 711, par. 6.
[70] *Ibid.*

serious breach by the institutions with regard to legislative measures involving choices of economic policy.

3.3.1.1. The nature of the sustained damage as a factor for the determination of the gravity of the breach : At the time when *Francovich* was decided, the serious and special damage requirement had already gone through different stages under the case law. In *HNL*[71], the emphasis seemed to be placed on the limited effects that the contested measures had on the financial interests of individuals. The great number of the affected persons appeared to be taken into account, only to the extent that it lessened the gravity of those effects on the undertakings concerned.[72] In the *Quellmehl* and *Maize Gritz* cases, these two conditions were mentioned alongside.[73] They subjected the establishment of a sufficiently serious breach on proof that both the infringement affected a limited and clearly defined group of commercial operators and that the loss sustained went beyond the bounds of the normal risks inherent in the market sector concerned. Subsequent case law clarified that it is the unforeseeability of the damage that may qualify it as serious and abnormal.[74]

The rationale underlying the introduction of the special and serious damage requirement is clearly the wish to limit the number of those entitled to compensation with regard to legislative breaches.[75] Such a restriction does not find its normative justification in the general principles governing the domestic legal systems on public liability.[76] Its application at national level has been confined to cases, where the payment of compensation does not require the proof of illegality or culpability.[77]

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[71] *HNL* : *op cit.* No 20.

[72] *Ibid.*, par. 6.

[73] Case 238/78, *Ireks-Arkady v. Council and Commission* [1979] ECR 2955, par. 11, Cases 241, 242 & 245 to 250/78, *DGV v. Council and Commission* [1979] ECR 3017, par. 11, Cases 261 & 262/78, *Interquell Stärke-Chemie v. Council and Commission* [1979] ECR 3045, par. 14 and Cases 64 & 113/76, 167 & 239/78, 27, 28 & 45/79, *Dumortier Frères v. Council* [1979] ECR 3091, par. 11.

[74] For example, Case 59/83, *Biovilac v. EEC* [1984] ECR 4057, par. 29.

[75] In *HNL* itself (*op cit.* No 20, par. 6), the Court declared that "individuals may be required, in the sectors coming within the economic policy of the Community, to accept within reasonable limits certain harmful effects on their economic interests as a result of a legislative measure without being able to obtain compensation from public funds".

[76] In this respect, the Opinion of Advocate General Capotorti in *HNL* : *ibid.*, points 5-6. Also the Opinion of Advocate General Tesauro in *Brasserie/Factortame III* : *op cit.* No 1, points 93-95.

[77] In France, legislative liability is established only on the objective basis of the principle of *egalité devant les charges publiques* and provided that special and abnormal damage is shown to exist. The proof of the existence of special damage is also required in the context of the objective public liability system introduced by the Spanish legal order. To the extent that it is relevant, the Recommendation R (84) 15 of 18 September 1984 of the Council of Europe on Public Liability makes a distinction between two kinds of liability. In Principle I, it refers to liability arising as a result of the defective exercise by the public authorities of their respective powers. In Principle II, it refers to a system of purely objective liability. It is only with regard to the latter type of liability that the proof of special and abnormal damage is required.

Public liability for breach of Community law is not objective in nature. The illegality of the act is always required and some form of culpability on the part of the defendant also needs to be shown. Inevitably, the special and abnormal nature of the damage has occupied under *Schöppenstedt* a completely different position than the one that it holds in the context of an objective liability system. It has been used as part of the test for the establishment of a sufficiently serious breach and not as the sole criterion for the determination of the right of the applicant to receive compensation from the public authorities, regardless of illegality.

It could be thus argued that, in the context of a liability system based on the concept of unlawfulness, the gravity of the breach should be ascertained by having regard exclusively to the activity of the wrongdoer and the general circumstances under which the violation has been committed without the interposition of any irrelevant factors such as the number of the persons affected and the size of their loss. Even if reasons of administrative and financial efficiency make it often necessary to require something more than the mere violation of the law in order for the payment of damages to be possible, this does not explain why the disregard by the public authorities of the limits on the exercise of their powers should be measured according to the gravity of the loss sustained by the plaintiff and the special nature thereof. This would place individuals under the obligation to overcome an extra hurdle the imposition of which is not justified, when the *raison d'être* for the establishment of liability is the illegal nature of the conduct of the wrongdoer and the gravity of the breach committed by it and not the reparation of the exceptional damage that is sometimes inflicted from lawful legislative measures. Requiring proof of special and abnormal damage in addition to or as part of the test for the establishment of a sufficiently serious breach would make it thus excessively difficult in practice for individuals to receive *Francovich* compensation. This being so, the gravity of the loss suffered by the plaintiff and the number of the persons affected by a given violation should be irrelevant for the application of the doctrine.

The conclusion seems to be that the transposition of the relevant requirements in the field of governmental liability should not take place, as this would infringe the principles of effectiveness and effective judicial protection that

the doctrine is based upon.[78] The need to prevent the payment of damages indefinite in time and amount is rather well served by the sufficiently serious breach requirement, ascertained completely autonomously from the type of loss sustained by the applicants. It should also be recalled that the establishment of governmental liability presupposes the infringement of a rule of law intended to confer rights on individuals.[79] This has been interpreted as excluding the payment of compensation for the violation of provisions aiming exclusively at the protection of the general interest.[80] It does not introduce a limitation as to the number of persons that should be affected by a given violation, but prevents the imposition of liability for breaches of rights that are not considered personal and identifiable. It distinguishes thus those entitled to claim protection under *Francovich* from all those having simply an interest in the maintenance and reinstatement of legality. Furthermore, the application of the mitigation principle may protect the public authorities from the payment of compensation for damages which were entirely foreseeable and could have been avoided by showing the normal diligence required in a given legal area.[81] It should be nevertheless for the suffering individuals to decide whether to bring the damages action or not, making themselves the assessment whether the magnitude of their loss and the chances of obtaining redress from the national treasury justify the time and expenses involved in a public liability claim.

The fact that no reference has been made so far to the need to prove the special and abnormal nature of the sustained damage, in order to receive compensation under *Francovich*, leads to the conclusion that this is not considered as a precondition for the establishment of a sufficiently serious breach on the part of the national authorities.[82] It would be desirable, if this development led to the reshaping of the relevant case law also with regard to violations committed by the

[78] In favour of the transposition of the special and abnormal damage requirement in the *Francovich* field, see Emiliou : 'State liability under Community law : Shedding more light on the Francovich principle ?', (1996) 21 *ELRev* 399, at pp. 408-409, Van Gerven : *op cit.* No 26, p. 39 and the Opinion of Advocate General Léger in *Hedley Lomas* : *op cit.* No 32, points 178-182. Against such a transposition, see Wathelet/Van Raepenbusch : 'La responsabilité des Etats Membres en cas de violation du droit communautaire. Vers un alignement de la responsabilité de l' Etat sur celle de la Communauté ou l'inverse ?', (1997) 33 *CDE* 13, p. 42 and the Opinion of Advocate General Tesauro in *Brasserie/Factortame III* : *op cit.* No 1, points 92 *et seq.*

[79] *Brasserie/Factortame III* : *ibid.*, par. 51.

[80] *Infra* 3.3.2.

[81] *Brasserie/Factortame III* : *op cit.* No 1, par. 84-85.

[82] However, note that reference to this requirement was made by the English High Court in *R. v. Secretary of State for Transport, ex parte Factortame and others* [1998] 1 CMLR 1353, par. 104 and 118.

Community.[83] It should be for the doctrine of governmental liability to influence the solutions adopted on this point with regard to the payment of damages from the defaulting institutions and not the other way round. It is interesting in this respect to note that the large number of those affected by a given violation does no longer constitute an obstacle for the receipt of compensation under *Schoppenstedt*, provided that the loss is sustained by a clearly defined group of commercial operators.[84] For the establishment of a sufficiently serious breach in this area it suffices that the defendant did not take into account a clearly distinct group of economic operators, particularly if the adopted measure is unforeseeable and exceeds the bounds of the normal economic risks.[85] There are even signs that the special and abnormal damage requirements have now ceased completely to play any kind of role for the receipt of compensation from the defendant institution.[86]

3.3.2. The intention of the infringed provision to confer sufficiently identifiable individual rights : The interpretation that should be given to this condition requires the examination of two related issues. It is first necessary to understand the circumstances under which a given provision may give rise to the creation of individual rights. At a later stage, it needs to be ascertained what is actually required in order for these rights to be regarded as sufficiently identifiable for the purposes of imposing *Francovich* liability.

3.3.2.1. The creation of individual rights : There are provisions which simply impose obligations without conferring identifiable rights.[87] Others aim exclusively at the protection of the general interest[88], the attainment of a certain degree of

[83] In this respect, see the Opinion of Advocate General Tesauro in *Brasserie/Factortame III* : *op cit.* No 1, point 96.
[84] In Cases C-104/89 & 37/90, *Mulder and others v. Council and Commission* (*Mulder II*) [1992] ECR I-3061, liability was imposed despite the huge number of applicants that would be entitled to receive compensation as a result. The Court was clearly influenced by its Advocate General Van Gerven, who distinguished between the terms limited and defined group and concluded that the number of persons affected by a given violation could not serve as a condition for the establishment of liability.
[85] Cases T-195 & 202/94, *Quiller and Heusmann v. Council and Commission* [1997] ECR II-2247, par. 58.
[86] Following the decision in *Bergaderm* : *op cit.* No 13. Also see *infra* 5.4.
[87] It is argued by Goffin : *op cit.* No 23, p. 538 that this is the case as concerns Articles 32 (4) and 37 (2) ECT. These provide for the establishment of a common agricultural policy and impose obligations on the political institutions, without giving rise to any individual rights. Also see in this direction Case T-571/93, *Lefebvre and others v. Commission* [1995] ECR II-2379, par. 41.
[88] For example, consider a measure that protects exclusively the general interest in a cleaner environment without its provisions being of a special interest to certain identifiable individuals.

administrative efficiency[89] and the establishment of an institutional balance and a spirit of cooperation between the various public authorities.[90] Their violation disturbs the principle of legality, but may not confer upon private parties the right to receive compensation from the public treasury. This is because the payment of damages presupposes the existence of personal and identifiable loss on the part of the applicant. It is not thus possible to bring a liability claim with regard to infringements concerning provisions that do not affect individual legal rights.

It becomes thus necessary to ascertain the approach followed by the case law on the existence of individual rights. Its general tenor is easily discernible, especially in the field of environmental protection. This area is regulated by measures drafted in a way as to pursue objectives serving the general interest. They impose upon their addressees obligations of conduct, without usually recognising in an explicit way the existence of corresponding individual rights. As a result, environmental measures have been proposed as examples of legislation protecting exclusively the public interest.[91] The judicial response has been very instructive in this respect. It is clarified that what needs to be examined is the objective pursued by the specific provision involved in each individual litigation and not the measure as a whole.[92] It is further declared that the mere fact that a given provision is drafted in terms of protection of the general interest does not exclude automatically the possibility that it might also intend to safeguard the rights of individuals. The creation of individual rights is thus possible even with regard to rules aiming at the protection of very general objectives, such as the protection of human health.[93] This line of reasoning should be placed in the context of the theory, according to which even provisions drafted exclusively in terms of protection of the general public may give rise to private rights for identifiable natural and legal persons that have

[89] Case C-380/87, *Enichem Base v. Comune di Cinisello Balsamo* [1989] ECR 2491. Article 3 (2) of Council Directive 75/442 of 15 July 1975 on waste (OJ 1975, L194/39) imposed on the administration the obligation to communicate certain information to the Commission. It was concluded that it did not create any rights for individuals. It merely aimed at the harmonisation of the relevant national legislations.

[90] To take an example from the field of Community liability, *Vreugdenhil II*: *op cit.* No 27.

[91] Schockweiler : 'La responsabilité de l'autorité nationale en cas de violation du droit communautaire', (1992) 28 *RTDE* 27, at p. 44. He refers to Council Directive 75/440 of 16 June 1975 (surface water I, OJ 1975, L194/39), Council Directive 79/869 of 9 October 1979 (surface water II, OJ 1979, L271/44) and Council Directive 80/68 of 17 December 1979 (OJ 1980, L20/43).

[92] For example, Case C-131/88, *Commission v. Germany* [1991] ECR I-825, par. 7.

[93] For example, Case C-361/88, *Commission v. Germany* [1991] ECR I-2567, par. 16, Case C-58/89, *Commission v. Germany* [1991] ECR I-4983 and Case C-59/89, *Commission v. Germany* [1991] ECR I-2607, par. 19.

inherently a special interest in their subject matter.[94] For example, it has been suggested that measures dealing with matters of reduction of environmental pollution might confer individual rights on the neighbours of the polluter.[95] In the same way, the prohibition on the provision of unlawful public aid is of a special interest to the competitors of the undertaking that has received the illegal financial assistance from the national funds.[96]

This approach is followed also with regard to the imposition of liability for normative acts on the basis of *Schöppenstedt*. The payment of damages under this formula is possible for breaches of rules that exist for the protection of the individual. This probably means that the applicant must belong to the category of the persons, that the infringed provision intended to benefit.[97] It is not nevertheless necessary that the protection of individual interests is the sole purpose of the violated norm, so long as their creation is one of the objectives pursued by it.[98] Similar solutions for the payment of damages from the public funds have also been adopted in many national legal orders.[99] It has now been confirmed that the same holds equally true in the *Francovich* field. Indeed, the mere fact that a given provision intends partly to safeguard more general interests does not preclude the availability of a damages action against the domestic authorities. It suffices that the protection of individual rights is amongst the objectives pursued by the infringed legal norm.[100] This is especially important with regard to breaches attributed to the legislature. The fact that the law pursues the attainment of the general good does not mean that it cannot give rise to individual rights. Any national rule reserving thus the imposition of public liability for infringements of duties directed expressly at a particular person or class of persons should be set aside[101], as exceeding what is permissible by *Francovich*.[102]

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[94] Temple Lang : *op cit.* No 44, p. 33.
[95] Temple Lang : *ibid.*
[96] *Ibid.* In the same direction, Mouameletzi : *op cit.* No 40, p. 384.
[97] Hartley : *The Foundations of European Community Law*, 4th edition, OUP 1998, p. 473.
[98] Indicatively, *Kampffmeyer* : *op cit.* No 68, p. 246. For an interesting discussion on this matter, see, Fuss : 'La responsabilité des Communautés européennes pour le comportement illégal de leurs organes', (1981) 17 *RTDE* 1.
[99] For example, in Germany, Portugal, Denmark, The Netherlands and Greece. For more, see Schockweiler/Wivenes/Godart : *op cit.* No 18. Also see Recommendation R (84) 15 on public liability, Principle I, point 18 (*op cit.* No 77).
[100] *Dillenkofer* : *op cit.* No 51, par. 38-39. Also see the Opinion of Advocate General Tesauro, at point 13.
[101] Paragraph 839 of the *Bürgerliches Gezetzbuch* (German Civil Code) and Article 34 of the *Grundgesetz* (German Basic Law), requiring that the official duty infringed be referable to a third party.
[102] *Brasserie/Factortame III* : *op cit.* No 1, par. 71-72.

A final issue that needs to be dealt with in this context is whether it suffices for the payment of damages that the infringed provision had simply the effect of conferring individual rights upon the applicant or whether it is further necessary to show that it actually intended to do so. The doctrine seems divided on this point. Most academics focus on the intention of the infringed norm to create individual rights.[103] However, certain others adopt a broader approach and show preference for the effects criterion.[104] In practice, the difference may not be as great as it seems at first sight. The intention to confer individual rights may arise both directly and indirectly, through the imposition of respective obligations on natural and legal persons and the public authorities. A very good example in this respect is given by *Dillenkofer*.[105] The argument was put forward in that case that the violation complained of by the applicants concerned a provision that did not give rise to any individual rights, since it only intended to impose on organisers and retailers of package travel the obligation to offer sufficient security.[106] The Court did not agree that this was indeed so. That obligation could have meaning and reason, only to the extent that it corresponded to respective individual rights.[107] This seems to confirm that it is indeed possible to impose liability for the violation of provisions that have the effect of conferring individual rights, without manifesting in an explicit way their intention to do so.

3.3.2.2. The requirement that the infringed provision be identifiable : It should not be taken for granted that all legal provisions intending to confer rights on individuals will be suitable for judicial review under *Francovich*. It will be certainly recalled that it does not matter in this respect whether it is possible to identify the legal subject that the plaintiff would have been obliged to claim a certain benefit

[103] Barav (a) : 'Omnipotent Courts', in Curtin/Heukels (eds.) : *Institutional Dynamics of European Integration*, Nijhoff Publishers 1994, pp. 291-292, Barav (b) : 'State liability in damages for breach of EC law in the national courts', (1996) 16 *YEL* 87, pp. 91-93, Pardon and Dalcq : 'La responsabilité des Etats Membres envers les particuliers en cas de manquements au droit communautaire', (1996) 115 *JT* 193, at p. 196, Szyszczak : 'European Community Law : New Remedies, New Directions ?', [1992] 55 *MLR* 690, p. 697.

[104] Simon : 'Droit communautaire et responsabilité de la puissance publique, glissements progressifs ou révolution tranquille?', (1993) 49 *AJDA* 235, p. 238, Prechal : *op cit.* No 28, pp. 326-328, Goffin : *op cit.* No 23, p. 537.

[105] *Dillenkofer* : *op cit.* No 51.

[106] Article 7 of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ 1990, L158/59).

[107] *Dillenkofer* : *op cit.* No 51, par. 41 and the Opinion of Advocate General Tesauro, at point 14.

from in the absence of the violation committed by the domestic authorities. From the moment that it can be shown that the loss complained of would not have been sustained, had the defendant complied with the public duties entrusted upon it, it is of little interest the identity of the debtor of the substantive rights enshrined in the provisions of the infringed legal norm.[108] Notwithstanding this fact, the content of that norm should be such as to be quantifiable with sufficient precision in monetary terms. This does not mean that its intention should always be to confer a pecuniary right on the applicant.[109] It rather suffices that it contains a guarantee with an easily identifiable subject matter, the infringement of which affects the financial interests of the plaintiff. The payment of damages is not nevertheless possible, when the infringed provision lacks the clarity and precision required for the national judge to be in a position to assess with sufficient certainty the financial content of the substantive right that it intended to confer upon its addressees.

The infringed provision should also be identifiable as to its intended beneficiaries, so as to be possible to ascertain whether the plaintiff is actually included amongst those entitled to receive compensation for its violation. The cases decided so far have not given rise to similar problems. The scarcity of guidance on this point may be interpreted as a sign that the issue is considered to be of a procedural nature, that should be left for its determination to the respective arrangements of the domestic legal orders. This would be hardly surprising, given the approach that has been followed with regard to the determination of the appropriate defendant under *Francovich*.[110] It has also been established in this respect that it is in principle for national law to determine the standing and legal interest of individuals to bring legal proceedings for the protection of the rights conferred upon them.[111] The discretion that the domestic legal orders enjoy as to the standing conditions for the initiation of public liability actions is nevertheless circumscribed by the need to ensure compliance with the effectiveness and equivalence provisos.[112]

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[108] See *supra* 1.2.1.
[109] Opinion of Advocate General Tesauro in *Brasserie/Factortame III* : *op cit.* No 1, at point 56.
[110] *Supra* 2.4.2.2.
[111] Case C-87 to 89/90, *Verholen & others v. Sociale Versekeringsbank* [1991] ECR I-3757, par. 24.
[112] For more on this point, see *infra* 4.2.3.1(c).

3.3.3. The existence of a sufficiently serious breach : In order for governmental liability to arise, it must be shown that some kind of illegality has been committed by the national authorities with regard to a given legal provision or principle. The establishment of unlawful conduct constitutes at present a necessary prerequisite also for the payment of damages from the political institutions.[113] The same holds equally true in the vast majority of the domestic systems on public liability.[114] However, it is not necessarily any kind of illegality that can give rise to the right of the plaintiff to receive compensation from the national treasury. The general trend seems to be that the imposition of public liability for domestic law violations is based on the notion of fault.[115] This concept is defined differently from the one country to the other and various degrees of culpability are necessary for the payment of damages to the suffering individuals.[116] Its establishment usually requires proof of deliberate intention or negligence on the part of the wrongdoer. Not any kind of negligence suffices, when the existence of grave fault has to be shown.[117] There are even instances, where the applicant is obliged to prove that the breach has been committed intentionally or at least knowingly.[118] In certain legal orders, the mere proof of illegality usually suffices for the establishment of fault.[119] In others, its existence is ascertained according to objective criteria.

What is asked in the latter case is whether the breach would have been committed under the same circumstances by a normally diligent authority.[120]

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[113] The Court has left open the possibility that liability in this area might be established even for loss arising from the lawful activity of the institutions. It has not nevertheless ordered so far the payment of damages on such a basis. In this respect, Cases 9 & 11/71, *Compagnie d'Approvisionnement v. Commission* [1972] ECR 391, par. 46, Case T-113/96, *Dubois et fils v. Council and Commission* [1998] ECR II-125, par. 42 and Case T-184/95, *Dorsch Consult Ingenieurgesellschaft mbH v. Council and Commission* [1998] ECR II-667. For more information on this point, see Bronkhorst : *op cit.* No 2, especially pp. 160-165.

[114] With the exception of Spain, where a purely objective system of public liability is established. Also see footnote No 2 above for other examples of cases, where the payment of compensation is accepted even for loss arising from the exercise of certain types of lawful activity by the domestic authorities.

[115] In Greece, however, the imposition of public liability depends solely on proof of illegality without the need to show any kind of fault on the part of the wrongdoer (Article 105 of the Law Introducing the Civil Code).

[116] In this direction, see Schockweiler/Wivenes/Godart : *op cit.* No 18 and Vandersanden/Dony (eds.) : *La Responsabilité des Etats Membres en cas de Violation du Droit Communautaire*, Bruylant 1997.

[117] For example, proof of serious fault is required in France for the establishment of public liability for judicial breaches.

[118] This is the case in the UK, where public liability for administrative domestic law breaches presupposes proof of misfeasance in public office. In this respect, see the decision of the English Court of Appeal in *Bourgoin SA v. Ministry of Agriculture, Fisheries and Food* [1986] 1 CMLR 267.

[119] This is the case in France (clearly accepted since the decision of the *Conseil d'Etat* of 26 January 1973 in *Ville de Paris v. Driancourt*, (1973) 29 *AJDA* 245), Belgium (see the decision of the Belgian *Cour de Cassation* of 19 January 1980, (1981) *Pas.Bel.* I 453) and Luxembourg. In the same direction, see the decision of the Italian *Corte di Cassazione* No 5361 of 22 October 1984, (1985) *Giustizia Civile* 1419.

[120] This is the case in Germany, Portugal, Denmark and The Netherlands. Also see Principle I of the Recommendation on Public Liability (*op cit.* No 77).

Culpability is thus measured against the image of the average public authority, which is conscious of its duties and possesses all the knowledge and information required for the performance of its functions. When the breach concerns a clear and precise obligation to attain a specific result, the existence of fault is established automatically. Indeed, such a violation would never have been committed by a diligent authority. In any other event, it is examined whether the wrongdoer has behaved *en bon père de famille* or whether it has infringed the duty of care imposed upon it in the specific field where the violation has taken place. Fault is thus becoming the subject matter of the infringement and ceases to constitute a subjective component of the conduct of the defendant.[121] However, there are still legal systems where this concept is given a more subjective and moral dimension.[122] These place the focus exclusively on the conduct of the specific wrongdoer that the breach is attributed to, without having regard to what would have been expected normally from a prudent public authority in a similar factual scenario.

Proof of fault is not required as such for the establishment of liability under *Francovich*.[123] Given the diversity of the solutions that prevail at national level, to have referred generally to such a requirement without clearly specifying its exact content and degree would have probably compromised the homogeneous and effective application of the doctrine. At the same time, the difficulties involved in the establishment of fault in the subjective sense with regard to the activity of the public authorities made it necessary to employ objective criteria in the determination of the circumstances under which the obligation to pay damages would arise. Recourse in this respect could have been possibly made to the normally diligent authority test. It was thought nevertheless preferable to apply the same standard, as the one required for the imposition of liability under the *Schöppenstedt* formula. The payment of damages was made accordingly subject to the establishment of a sufficiently serious breach committed by the domestic authorities. The emphasis is thus clearly on the violation itself and the general circumstances under which it has taken place, rather than on the conduct of the wrongdoer as such. There are two

[121] See in this respect the Opinion of Advocate General Tesauro in *Brasserie/Factortame III*: *op cit.* No 1, point 89.
[122] This is so in the UK and Ireland.
[123] *Brasserie/Factortame III*: *op cit.* No 1, par. 75 *et seq.*

important issues arising in this respect. In the first place, it is wondered whether the concept of the sufficiently serious breach and the way that it has been applied in practice manages to strike a fair balance between the right of individuals to receive compensation for the loss that an unlawful public activity has caused to them and the need to restrict the payment of public liability for reasons of administrative and economic efficiency. At a later stage, as conclusive an answer as possible needs to be given as to what actually constitutes such a sufficiently serious breach in the field under consideration.

3.3.3.1. From the discretion criterion towards the inexcusable breach standard.

a) Breaches committed in the exercise of wide discretionary powers : It was declared in *Brasserie/Factortame III* that breaches committed in fields where the defendant enjoys latitude comparable to the one possessed by the political institutions in the performance of their legislative duties will be considered as sufficiently serious, if the national authority concerned has manifestly and gravely disregarded the limits on its discretion.[124] The factors that the national judge may take into account in order to determine whether such a manifest and grave disregard has indeed taken place include the clarity and precision of the infringed provision, the measure of the discretion left by it to the national authorities, the intentional or involuntary nature of the violation, the excusable or inexcusable character of the error and the extent to which the conduct of the institutions has contributed to the adoption or retention of unlawful national measures and practices.[125]

It is immediately apparent that the liability imposed in the light of these factors cannot be considered as strict in nature, in the sense of arising without the need to prove any kind of culpability on the part of the defendant.[126] While no reference is made to the concept of fault as such, it is clear that illegality *per se* does not suffice for the payment of damages to the suffering individuals. Even if proof of

[124] *Ibid.*, par. 55.
[125] *Ibid.*, par. 56.
[126] Craig (b) : *op cit.* No 28, p. 76, Vandersanden : 'Le Droit Communautaire', in Vandersanden/Dony : *op cit.* No 116, pp. 5-61, at pp. 52-53, Tesauro : 'Responsabilité des Etats Membres pour violation du droit Communautaire', (1996) 3 *RMUE* 15, p. 28, Deards : '"Curiouser and Curiouser" ? The Development of Member State Liability in the ECJ', (1997) 3 *EPL* 117, p. 125.

bad faith and wrongful knowledge on the part of the wrongdoer is not necessarily required, certain objective and subjective factors connected with the concept of fault may well be relevant for the purpose of determining whether a given breach is serious.[127] What is actually implied by the indicative test provided for in this respect seems to be that the establishment of liability requires proof of grave negligence. Its existence is nevertheless ascertained by having regard to the totality of the circumstances surrounding the breach and not merely those referring to the mentality of the wrongdoer. This is not different in practice from requiring proof that the breach would clearly not have been committed by a normally diligent authority or that the duty of care has been manifestly violated. Once such a flagrant violation is found to exist on the basis of a given factual background, no further element of culpability can be required. It has indeed been clarified that the obligation to pay damages cannot be made dependent on any concept of fault, going beyond that of a sufficiently serious breach.[128] For example, it is not possible to make the payment of compensation subject to proof that the wrongdoer intended to infringe its respective obligations or that it even had knowledge of the illegality of its action.[129] While the existence of good faith on the part of the defendant may sometimes lead to the exoneration of liability, this will depend on whether its creation was actually justified on the basis of the circumstances under which the breach was committed.

The decisive factor for the restriction of liability under the *Brasserie/Factortame III* test is not the nature of the authority that the breach is attributed to, but rather the latitude left to it in the exercise of its powers.[130] The margin of the discretion enjoyed by the wrongdoer is not nevertheless measured by reference to what the situation is under the domestic legal order.[131] While it is usually the legislature that enjoys a wider margin of discretion in the performance of its duties, it is not excluded that even the administration may be called upon to exercise such kinds of functions in the *Francovich* context. Conversely, it is not

[127] *Brasserie/Factortame III* : *op cit.* No 1, par. 78.
[128] *Ibid.*, par. 79.
[129] *Ibid.*, par. 73.
[130] Opinion of Advocate General Tesauro in *Brasserie/Factortame III* : *ibid.*, point 78. Also see Craig (b) : *op cit.* No 28, pp. 74-75 and Dubois : 'La responsabilité de l' Etat législateur pour les dommages causés aux particuliers par la violation du droit communautaire et son incidence sur la responsabilité de la Communauté', (1996) 12 *RFDA* 583, at p. 591.
[131] *Haim* : *op cit.* No 53, par. 40. Also see the Opinion of Advocate General Mischo, at points 70-71.

taken for granted that any kind of legislative action has taken place in the performance of wide discretionary powers. It is not clear when such a wide discretion will be found to exist, but factors such as the existence or absence of harmonisation and the state of development of the law in a given legal area should certainly be taken into account.[132]

b) Breaches committed in the performance of rule making powers : The whole discussion in *Brasserie* was made with regard to violations taking place in wide discretion areas. This gave rise to uncertainty as to whether the fault based criteria provided for in the judgment were intended to be of a general application. It was especially asked whether the corollary of the relevant judicial statements should rather be that the mere violation of the law would suffice for the satisfaction of the sufficiently serious breach condition, when the wrongdoer had acted without enjoying much leeway in the performance of its functions. If the latter was in fact the case, it would practically mean that *Francovich* liability would normally be imposed on a strict basis. Indeed, it is only exceptionally that the freedom of action of the national authorities can be compared with the one possessed by the political institutions in the performance of their normative duties.[133] Notwithstanding this fact, to impose liability *per se* for breaches basically due to the uncertainty that often characterises the exact scope of the legal obligations of the domestic authorities would be unfair and politically dangerous. It would also be potentially capable of hindering to an inefficient level the exercise of public functions.[134]

It is important to note that, for both Advocates General Tesauro and Léger, it was not only the margin of discretion enjoyed by the wrongdoer that should determine the need for the imposition of some kind of restriction on the payment of damages from the national treasury. It was also the greater or lesser degree of precision of the obligation imposed upon the domestic authorities and the possibility of identifying with a sufficient degree of precision the content of the right asserted

[132] Hervey/Rostant : 'After Francovich : State liability and British employment law', (1996) 25 *ILJ* 259, at p. 269.
[133] *Supra* 3.2.2. In the same direction, *Brasserie/Factortame III* : *op cit.* No 1, par. 46 and the conclusions of Advocate General Tesauro, at point 69. More indirectly, the Opinion of Advocate General Léger in *Hedley Lomas* : *op cit.* No 32, point 143.
[134] *Supra* 3.2.2.

by the plaintiff.[135] The clarity and precision criteria are included amongst the factors that the national courts may take into account, in order to ascertain whether the defaulting authority has manifestly and gravely disregarded the limits on its discretion. The problem was that it was not clear whether recourse to them would be possible, even when the wrongdoer enjoyed considerably reduced or no discretion at all in the field where the breach was committed.

A first indication in this respect was provided for in *BT*.[136] The case concerned the misimplementation of Directive 90/351.[137] This was certainly a breach that could not be considered as having taken place in a wide discretion area, given the absolute duty imposed upon the national authorities to proceed to the correct and timely adoption of implementing legislation. Notwithstanding this fact, the Court went on to apply the criteria of *Brasserie/Factortame III*. It concentrated especially its examination on the clarity and precision of the infringed provision.[138] It did not make any reference to the discretion factor and declared that the gravity of the breach depended on whether the national authority concerned had manifestly and gravely disregarded the limits on the exercise of its legislative powers.[139] Exactly the same policy was followed in *Denkavit*[140], *Rechberger*[141] and *Lindöpark*.[142] All of these cases involved misimplementation breaches.[143] In none of them was it implied that the existence of a wide discretion constitutes a prerequisite for having recourse to the manifest and grave disregard test and the criteria that govern its application.[144] It now seemed to suffice that the breach had been committed in the exercise of some kind of legislative or rule making power, regardless of whether this was coupled with the making of difficult policy choices by the wrongdoer.[145]

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[135] Opinion of Advocate General Tesauro in *BT*: *op cit.* No 28, point 35 and *Brasserie/Factortame III*: *op cit.* No 1, point 69. Opinion of Advocate General Léger in *Hedley Lomas*: *op cit.* No 32, at point 160.
[136] *BT*: *ibid.*
[137] Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1990, L297/1).
[138] *BT*: *op cit.* No 28, par. 42 *et seq.*
[139] *Ibid.*, par. 42.
[140] Cases C-283, 291 & 292/94, *Denkavit Internationaal v. Bundesampt für Finanzen* [1996] ECR I-5063, par. 50 *et seq.*
[141] Case C-140/97, *Rechberger and others v. Austria* [1999] ECR I-3499, par. 50 *et seq.*
[142] Case C-150/99, *Stockholm Lindöpark AB v. Swedish State* [2001] ECR I-493, par. 39 *et seq.*
[143] The misimplementation concerned respectively Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ 1992, L225/6), Council Directive 90/314/EEC (*op cit.* No 106) and the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes (OJ 1977, L145/1).
[144] For example, *Dillenkofer*: *op cit.* No 51, par. 25, Case C-127/95, *Norbrook Laboratories Ltd. v. Ministry of Agriculture, Fisheries and Food* [1998] ECR I-1531, par. 109 and *Haim*: *op cit.* No 53, par. 38.
[145] Also see Hilson: 'Liability of Member States in damages: The place of discretion', (1997) 46 *ICLQ* 941, pp. 946-947.

Legislative choices of this kind are made especially with regard to measures, that require the adoption of national legislation for their application in the domestic legal order. What was actually clarified by *BT* and the cases following it was that public liability would not be strict, also when the breach had been committed in the exercise of some kind of implementing discretion. This was important, given the great variety of forms and intensity that the incorrect transposition of the law may take in practice and the interpretative difficulties that the national authorities often encounter in their effort to comply with their respective obligations.[146] However, the same fault based liability regime applies even when the exercise by the defendant of its legislative activity does not involve the performance of implementation powers. In *Konle*, the applicant alleged damage sustained due to the existence of inconsistent national legislation on land transactions. Reference was then made to the manifest and grave test and the relevant criteria provided for in *Brasserie*, without requiring proof that the wrongdoer had acted in a wide discretion area.[147]

A first important observation arising in this respect is that the case law does not seem to find it necessary to differentiate the establishment of a sufficiently serious breach, depending on whether the violation has been committed in a wide discretion area or in the making of legislative choices by the national authorities in a field where their freedom of action is circumscribed to a great extent by the existence of superior legal provisions and principles.[148] For those considering that the exercise of discretionary powers involves a greater degree of difficulty than the interpretation and implementation of binding but often unclear legal rules, this choice is often seen as subjecting the payment of damages in the latter field to the satisfaction of a standard that has been developed with regard different kinds of violations and which is in any case more stringent than the one that would be appropriate under the circumstances.[149] On the contrary, those who find that pure legislative discretion and interpretative or implementing discretion do not differ

[146] Long before *BT*, many authors had strongly advocated against the imposition of strict liability with regard to breaches consisting in the misimplementation of Community provisions. Indicatively, see Craig (a) : *op cit.* No 28, especially pp. 614 *et seq.* and Prechal: *op cit.* No 28, pp. 323-324.
[147] Case C-302/97, *Klaus Konle v. Republic of Austria* [1999] ECR I-3099, par. 58.
[148] On whether such a differentiation should indeed exist, see *supra* 3.2.2.
[149] Very characteristically in this direction, Van Gerven : *op cit.* No 31, pp. 528-529 and 544.

considerably in nature and measure of difficulty as regards their exercise will certainly not object to the application of similar standards in both cases.[150]

c) Violations not involving the exercise of discretionary powers or the making of legislative choices by the wrongdoer : The implication continued nevertheless to remain that recourse to the manifest and grave disregard test presupposed the exercise of some kind of legislative power by the defaulting authority. This was further reinforced by a statement made in *Lomas*, with regard to the violation by the administration of a directly effective provision on free movement of goods.[151] It was declared that, when the infringement has taken place in a field where the wrongdoer is not called upon to make any legislative choices and has only considerably reduced or even no discretion at all, the mere violation of the law may be sufficient to establish the existence of a sufficiently serious breach.[152] No reference was made to the need to meet the manifest and grave disregard test, nor was it attempted to determine the gravity of the breach on the basis of the factors provided for in *Brasserie.* The same approach was followed in *Dillenkofer*[153], involving the failure to adopt the required national implementing legislation.[154] It looked as if a rule of strict liability had been established with regard to violations, that had not taken place either in the exercise of a wide discretion or at least in the making of legislative choices by the public authorities.

This would be clearly very unsatisfactory, especially to the extent that the payment of damages under such circumstances would be made without taking into account the clarity and precision of the infringed legal standard and the interpretative difficulties that the domestic authorities are often faced with even in the simple application of the law. It is important in this respect that, in all the cases involving misimplementation breaches that have been decided so far, the gravity of the infringement was determined particularly with regard to the above mentioned factors. This was made in an apparent attempt to ascertain whether the general

[150] Especially see Craig (b) : *op cit.* No 28, pp. 82-84.
[151] Hedley Lomas : *op cit.* No 32.
[152] *Ibid.*, par. 28.
[153] *Dillenkofer* : *op cit.* No 51, par. 25. Also see *Norbrook* : *op cit.* No 144, par. 109 and *Haim* : *op cit.* No 53, par. 38.
[154] Council Directive 90/314/EEC : *op cit.* No 106.

circumstances surrounding the breach could provide some kind of justification for the action of the wrongdoer.[155] The uncertainty of the law in a given area may lead thus to the exoneration of liability, when the legislature chooses the wrong way to give effect to a binding legal obligation. This being so, there does not seem to exist any reason why the same should not equally be accepted when a public authority understands incorrectly the meaning of the provision that it is called upon to apply.

To give an example, the same interpretative difficulties exist both when the legislature has to implement an unclear legal measure and when the administration is placed under the obligation to apply directly an imprecise legal rule or to give effect to the provisions of a vaguely drafted Regulation.[156] In both cases, it would be unfair and politically incorrect to impose liability when the national authorities have done their best to live up to their respective obligations but have failed to do so due to the imprecision of the legal standard involved. The introduction of a rule of strict liability under such circumstances would be potentially capable to hinder the effective performance of public duties, to the detriment of the interests of the general public.[157] It is not thus surprising that heavy criticism has been exercised against the conclusion that seemed to arise from the language employed in *Lomas*.[158]

i) Shedding light on the exact scope of the per se sufficiently serious breach test: It is nevertheless necessary to examine whether the relevant statement can be given an alternative interpretation that will not preclude reliance on the excusable breach defence, when the violation has not taken place either in a wide discretion field or in the exercise by the public authorities of their legislative powers. It is submitted that what should actually be understood by this judicial pronouncement is that breaches of clear, precise and incapable of being misunderstood obligations will always be considered as sufficiently serious, without the defendant being allowed to argue the existence of good faith in their perpetration.[159] Indeed, the violation of a

[155] *BT* : *op cit.* No 28, par. 42-46, *Denkavit* : *op cit.* No 140, par. 50-54, *Rechberger* : *op cit.* No 141, par. 50-53, *Lindöpark* : *op cit.* No 142, par. 39-42.
[156] In the same direction, see Wyatt : *op cit.* No 30, p. 7.
[157] *Supra* 3.2.2.
[158] Steiner : *op cit.* No 26, pp. 98 *et seq.*, Wyatt : *op cit.* No 30, p. 7, Van den Bergh/Schäfer : *op cit.* No 28, pp. 564-565.
[159] This is how Van Gerven : *op cit.* No 31, p. 521 understood the notion of the mere infringement breach, writing before the decision in *Lomas*. This is also the interpretation favoured by Steiner : *ibid.*, pp. 101 *et seq.*

clear legal standard usually shows the existence of some kind of wrongful intent or knowledge and should thus suffice to establish the manifest and grave disregard by the defaulting authority of the limits in the exercise of its powers. At the same time, the imposition of liability under such circumstances does not give rise to the danger that the wrongdoer might be over deterred in the performance of its public duties. When the law is clear and unambiguous, the national authorities can easily comply with it without being obliged to adopt an excessively high level of care that might lead to inefficiencies in the exercise of their functions.[160]

It could be thus argued that *Lomas* and *Dillenkofer* were decided on the basis of the mere infringement rule, simply because they both concerned breaches the sufficiently serious nature of which was evident due to the clarity of the infringed legal standard. In the former case, it must have been considered that the existence of harmonising legislation in the field where the breach was committed made it clear that the defendant could no longer rely upon the grounds of defence provided for by the Treaty in order to prohibit the export of live sheep. One may possibly disagree as to whether the situation was indeed as clear, as it was actually thought in the judicial determination of the dispute.[161] It is also true that *Lomas* shows that what is sometimes considered as clear and unambiguous by the courts may have actually posed genuine interpretative problems for the defaulting domestic authorities. However, the fact remains that liability seems to have been imposed in that case on the basis that the wrongdoer was considered to have acted patently without any justification.[162] The answer would have been the same, even if explicit reference had been made to the manifest and grave disregard test and the conditions for its determination. As for *Dillenkofer*, there is little doubt that the failure to implement binding legal measures constitutes automatically a very flagrant violation of the law. It is only in certain exceptional circumstances that this might not be actually so.[163] After all, this was precisely the reason why it was not considered necessary to make

[160] In this respect, Van den Bergh and Schäfer : *op cit.* No 28.
[161] For example, Advocate General Léger was much more equivocal on this point that the Court itself. Also see Van den Bergh and Schäfer : *ibid.*, p. 565.
[162] *Hedley Lomas* : *op cit.* No 32, par. 27 and 29.
[163] With the possible exception of cases, where the defaulting authority considers in good faith that its national legislation already complies with the requirements of a given Directive and does not thus proceed to its transposition. On this issue, see *infra* 3.3.3.2(a).

explicit reference in the *Francovich* litigation to the sufficiently serious breach requirement.[164]

ii) The clarification offered by the case law : That the mere infringement rule refers exclusively to breaches of clear, precise and incapable of being misunderstood obligations is further reinforced by the fact that violations persisting despite the existence of clear case law or consisting in the defiance of an order of the President of the Court have been declared to be *per se* sufficiently serious.[165] This is certainly so, because in both cases the wrongdoer knows beyond doubt that its activity infringes manifestly the principle of legality. Further indications towards this direction have been provided for in *Brinkmann*.[166] The case concerned the mistaken application of an unimplemented Directive.[167] The breach had not been committed in a wide discretion area and no legislative choices in the strict sense had to be made by the administration, in its attempt to live up to its obligations under the direct effect principle. Despite this fact, the Court did not refer to the mere infringement rule but proceeded to the examination of the sufficiently serious breach requirement. By having regard to the clarity and precision of the provisions of the unimplemented measure, it came to the conclusion that the interpretation given to them was not manifestly contrary to their wording as to give rise to damages liability.[168]

The implication is clear and double-edged. The decisive factor for the determination of the sufficiently serious breach test is the clarity and precision of the law in the field where the breach has been committed and the extent to which the conduct of the wrongdoer can be considered as reasonable, with regard to the difficulties that it had to encounter in the performance of its functions. The clearer the content of a given legal obligation is, the more it decreases the latitude enjoyed by the national authorities and the more difficult it becomes to plead the existence of a justifiable error in a given case.[169] At the same time, the clarity and precision

[164] *Supra*, the text corresponding to footnotes No 41 *et seq.*
[165] *Brasserie/Factortame III* : *op cit.* No 1, par. 57 and 64.
[166] Case C-319/96, *Brinkmann Tabakfabriken GmbH v. Skatteministeriet* [1998] ECR I-5255.
[167] Second Council Directive 79/32/EEC of 18 December 1978 on taxes other than turnover taxes which affect the consumption of manufactured tobacco (OJ 1979, L10/8).
[168] *Brinkmann* : *op cit.* No 166, par. 30-31. Also the Opinion of Advocate General Cosmas, at points 30-33.
[169] Very clearly in this direction, *Rechberger* : *op cit.* No 141, par. 51 and *Lindöpark* : *op cit.* No 142, par. 40.

criteria are applied with regard to any kind of violation. It does not matter in this respect the margin of the discretion enjoyed by the wrongdoer and the exercise or not by it of legislative powers. It could even be argued that it is exactly the clarity of the legal standard that the national authorities have to comply with that determines the scope of their discretion for the purposes of *Francovich*.[170] The clarity of the infringed provision is in fact sometimes such, that there is no need to make detailed reference to the criteria of *Brasserie/Factortame III* in order to establish the existence of a sufficiently serious breach.

That this is indeed so has been established emphatically in *Haim*. The violation concerned the application of inconsistent national legislation by a public body. One of the questions asked was whether the mere fact that the wrongdoer clearly did not possess any kind of latitude in the perpetration of the breach was enough to establish the sufficiently serious nature of the latter. Specific emphasis was placed in this respect on the wording of the relevant statement in *Lomas*. It was eventually declared that, when the violation has not occurred either in a wide discretion field or in the exercise of legislative powers, the mere infringement of the law may but does not necessarily constitute a sufficiently serious breach.[171] The gravity of the conduct of the wrongdoer needs to be determined by reference to the criteria provided for in *Brasserie/Factortame III*.[172] There was no explicit attempt to proceed to the application of these criteria to the facts of the specific case, but the implication of certain statements made in this regard seemed to be that the infringement at issue might not have been sufficiently serious.[173]

This confirms that the mere infringement rule was applied to both *Lomas* and *Dillenkofer*, simply because the detailed examination of any fault based criteria was not considered as necessary on the facts of those cases. This was not equally so in *Haim*. The absence of clear case law at the time when the breach was committed[174] and the exceptional situation of the applicant impeded the efforts made by the

[170] See the Opinion of Advocate General Léger in *Norbrook* : *op cit.* No 144, point 133. He essentially argued that the clarity and precision of the law takes away any discretion that the national authorities may enjoy in a given area and renders their violations sufficiently serious. Although his views were expressed with regard to failures to transpose, they seem to have a wider application. This position has been now adopted by the Court in *Lindöpark* : *ibid.*, par. 40.
[171] *Haim* : *op cit.* No 53, par. 41. Also see the Opinion of Advocate General Mischo, at points 75 *et seq.*
[172] *Ibid.*, par. 42. Also the Opinion of Advocate General Mischo, at points 54-55.
[173] *Ibid.*, par. 46. Advocate General Mischo clearly considered that the breach was excusable (points 56 *et seq.*).
[174] *Ibid.*, par. 46. Also the Opinion of Advocate General Mischo, at points 63-64.

national authorities to live up to their relevant obligations.[175] It was not thus self-evident that the violation involved in that case could be considered as sufficiently serious, but its gravity had to be determined by the national court on the basis of the totality of the circumstances under which it had taken place. As the law now stands, the imposition of liability under *Francovich* will never be strict in nature. The existence of a sufficiently serious breach is always ascertained according to fault based criteria, the most important of which are the clarity and precision of the law in a given legal area. A mere infringement is never capable in itself to give rise to the payment of damages, unless it concerns the violation of a clear, unambiguous and incapable of being misunderstood legal obligation. The culpability of the defendant is established automatically in such circumstances, since the clarity of the law precludes the existence of an excusable breach.

A very clear example of how the sufficiently serious breach test is now applied is given by *Lindöpark*.[176] The case concerned the erroneous adoption of national implementing legislation.[177] Reference was made again to the need to prove that the defendant had manifestly and gravely disregarded the limits on the exercise of its powers.[178] It was then examined whether this was indeed so, on the basis of the clarity and precision of the infringed legal norm.[179] It was found that the language of the misimplemented measure was so clear and unambiguous, that the defendant was not in a position to make any legislative choices and had only considerably reduced discretion in this respect.[180] It was further added that in such circumstances the mere infringement of the law may be sufficient to establish the existence of a sufficiently serious breach.[181] Given the clarity of the law in the field where the violation had taken place, the absence of relevant case law and the fact that no proceedings had been initiated yet under the public enforcement mechanism could not affect the conclusion that the defendant had committed a violation that the necessary degree of gravity to give rise to its liability under *Francovich*.[182]

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[175] Opinion of Advocate General Mischo in *Haim* : *ibid.*, par. 61-62.
[176] *Lindöpark* : *op cit.* No 142. Also see the Opinion of Advocate General Jacobs, at points 57-75.
[177] Involving Council Directive 77/388/EEC : *op cit.* No 143.
[178] *Lindöpark* : *op cit.* No 142, par. 39.
[179] *Ibid.*, par. 39-40.
[180] *Ibid.*, par. 40.
[181] *Ibid.*
[182] *Ibid.*, par. 41.

3.3.3.2. Distinguishing between excusable and inexcusable breaches : At the end of the day, everything comes down to determining what actually constitutes an inexcusable violation for the purposes of damages liability. The final word on whether a sufficiently serious breach has been committed in the context of a given litigation belongs to the national judge, who will decide the case. It is only he that has the necessary factual information to make the relevant assessment.[183] Even when a case is dealt with under the preliminary reference procedure, the ruling given in this direction is confined theoretically to the interpretation of the law and does not extend to its application to the facts of the dispute. Notwithstanding this fact, the national judges are obliged to determine the issue on the basis of the criteria provided for in this direction by the relevant case law and to apply these criteria in accordance with the guidelines often given to them.[184] This is the inescapable consequence of the authoritative power attributed to the judicial pronouncements made under a preliminary ruling. The guidance offered in this respect is sometimes of such a nature, as to actually direct towards the conclusion that should be arrived at by the referring court with regard to the gravity of a given breach.[185] In some cases, the answer given to the preliminary question determines itself the nature of the violation complained of by the applicant.[186] On the basis of what has already been decided, it is thus possible to draw some conclusions as to what kinds of infringements should be considered as sufficiently serious. It will facilitate our examination to distinguish between two general categories of possible breaches.

a) Breaches consisting in the failure of the domestic authorities to act in a certain way : In the first category, one can clearly classify the failure to adopt the implementing legislation required for the transposition of a given measure in the

[183] This has been accepted since *Brasserie/Factortame III* : *op cit.* No 1, par. 58.
[184] *Konle* : *op cit.* No 147, par. 58, *Haim* : *op cit.* No 53, par. 44.
[185] This was the case in *Brasserie/Factortame III* : *op cit.* No 1, par. 58-63. It was implied there that a different answer should be given as to the gravity of the various breaches committed by the defendants.
[186] This is especially the case with regard to cases involving misimplementation breaches. This policy has been followed in *BT*: *op cit.* No 28, par. 41-46, *Denkavit* : *op cit.* No 140, par. 49-54, *Rechberger* : *op cit.* No 141, par. 49-53 and *Lindöpark* : *op cit.* No 142, par. 34-42. In the first two cases, it was found that the sufficiently serious breach requirement was not met. The opposite conclusion was reached in *Rechberger* and *Lindöpark*. The same policy has also been followed in Case C-118/00, *Larsy v. Institut National d'assurances sociales pour travailleurs indépendants* [2001] ECR I-5063 with regard to a breach concerning the misapplication of a Regulation. The Court concluded that a sufficiently serious breach could be indeed established on the facts of that case. For more information in this respect, see *infra* 3.3.3.2(b).

domestic legal order. There is no discretion left in this respect to the domestic authorities. Their omission to proceed to timely implementation constitutes thus a violation of an unambiguous legal duty and establishes automatically the existence of a sufficiently serious breach.[187] The defendant is not allowed to put forward as a defence that the deadline prescribed by the measure was excessively short and to rely on the fact that other countries have equally violated their obligation to adopt the necessary implementing legislation.[188] It may not especially plead provisions and practices prevailing in its internal legal system, in order to justify its failure to observe the obligations and limitation periods prescribed by the law.[189] It is not even permitted to argue that the case law of its national courts already guarantees the protection offered by the unimplemented measure.[190] Indeed, a judicial practice does not provide a satisfactory degree of legal certainty and does not offer sufficient safeguards that the objectives pursued by the law will be fully attained. As it has been clearly declared in the context of the public enforcement mechanism, the full implementation of a measure in law and not only in fact requires the establishment of a specific legal framework in the area in question.[191]

It is nevertheless submitted that there are certain exceptions to the application of the mere infringement rule, with regard to violations of the implementation duty. It has been thus declared that, when the administration gives effect directly to the provisions of an unimplemented measure, any loss suffered by individuals is not due to the failure of the legislature to proceed to its transposition in the domestic legal order but rather to the mistaken application of its requirements by the administrative authorities. The existence of a sufficiently serious breach in such a case will not be thus established automatically, but it will be rather determined on the basis of the circumstances under which the violation has been committed. The court will have regard especially to the clarity and precision

[187] *Francovich* : *op cit.* No 4, *Dillenkofer* : *op cit.* No 51, par. 25-29.
[188] *Dillenkofer* : *ibid.*, par. 52 *et seq.* Also the Opinion of Advocate General Tesauro, at point 29.
[189] *Ibid.*, par. 53.
[190] In *Dillenkofer*, one of the questions referred to was whether the defendant could have omitted to transpose Article 7 of Directive 90/314 on the basis that the case law of the *Bundesgerichtshof* already offered an equivalent degree of protection. It was found that the protection offered by virtue of that case law did not satisfy the requirements of the measure, but it was not clarified what the situation would have been in the opposite case (par. 67). Advocate General Tesauro went further in this respect and argued that the principle of legal certainty would be infringed, if reliance was made on the case law of a given court to ensure compliance with the requirements of a Directive (point 24 of his conclusions).
[191] *Commission v. Germany* : *op cit.* No 92, par. 28.

criteria.[192] There are also cases, where the failure to proceed to the required implementation is simply due to the fact that the defaulting authority considers erroneously that its existing national legislation already suffices to ensure compliance with the requirements of the measure that needs to be transposed in the domestic legal order.[193] Technically, such a violation should be treated under the mere infringement rule. However, it is in substance much closer to a case of misimplementation. The existence of a sufficiently serious breach should thus depend on the determination of whether the interpretative error made by the wrongdoer can be considered as excusable in the context of the specific factual background involved.[194]

Uncertainty as to the type of the violation that has been committed also exists, when the breach consists in the failure to implement a single provision of an otherwise correctly transposed measure. Such a problem arose in *Rechberger*.[195] The defendant in that case had restricted the temporal application of Article 7 of Directive 90/314[196] only to package tours with a departure date five months after the entry into force of that measure. This was considered as a violation capable to give rise to damages, despite the fact that the wrongdoer had transposed correctly all the other provisions of the involved legal act.[197] It was opined that the breach should be treated as one of non-implementation.[198] It was decided, however, that this was rather a case of misimplementation. Its gravity needed thus to be ascertained on the basis of the clarity and precision of the incorrectly transposed provision.[199] The conclusion reached did not differ, since it was obvious from the wording of the measure itself that the defendant did not have any discretion to introduce such a temporal restriction and that it had committed a sufficiently serious breach by doing so. This case nevertheless shows that the dividing line between failure to implement in time, constituting automatically a sufficiently serious breach, and incorrect

[192] *Brinkmann* : *op cit.* No 166, par. 29-30. Also the Opinion of Advocate General Cosmas, at point 30.
[193] This was the situation in Case C-334/92, *Wagner-Miret* [1993] ECR I-6911. Since the questions asked concerned basically the application of the indirect effect doctrine, the applicants were merely reminded that they could also seek protection under a *Francovich* action
[194] In this respect, Tridimas : *op cit.* No 26, pp. 18-19.
[195] *Rechberger* : *op cit.* No 141.
[196] Council Directive 90/314 : *op cit.* No 106.
[197] *Rechberger* : *op cit.* No 141, par. 41 *et seq.* Also see the Opinion of Advocate General Saggio, points 38 *et seq.*
[198] Opinion of Advocate General Saggio in *Rechberger* : *ibid.*, points 38 *et seq.*
[199] *Rechberger* : *ibid.*, par. 49 *et seq.*

implementation, requiring the application of the fault based criteria introduced by the case law, may actually be less clear cut in practice than what it is often thought.

This first category also comprises failures to give an end to infringements already established under the public enforcement mechanism. The judicial determination of the unlawfulness of a given conduct under this procedure does not constitute a prerequisite for the payment of *Francovich* damages to individuals.[200] It is nevertheless apparent that it is no longer possible for the wrongdoer to rely on the excusable breach defence, if it continues with its violation despite the existence of clear case law on the matter.[201] An infringement that could have thus been regarded originally as not having the necessary degree of gravity for the imposition of governmental liability becomes automatically inexcusable, if it persists despite its judicial establishment under enforcement proceedings. This should not be confused with the situation, where the defaulting authority attempts unsuccessfully to comply with a judgment given under the public enforcement mechanism. In the latter case, the gravity of the breach will have to be determined on the basis of various factors connected with the complexity of the circumstances of the case and the difficulties involved in ensuring compliance with the judicial pronouncements made in the context of the enforcement action.

The same is the case with regard to breaches consisting in the defiance of the interim orders of the Court. An interim order is mandatory in nature and takes immediate effect, without the need for further action by the domestic authorities. In such circumstances, the wrongdoer knows beyond doubt that it must proceed to a certain kind of action but fails nevertheless to do so. Its defiance constitutes thus an obvious breach, that should suffice of itself for the payment of damages to the affected individuals.[202] The situation is different, when the competent national authority simply misinterprets the content of the order. Its violation in such circumstances should be treated as one involving the misapplication of a legal rule and should be ascertained by taking into account the clarity and precision criteria.

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[200] *Brasserie/Factortame III*: *op cit.* No 1, par. 91 *et seq.* Also see the Opinion of Advocate General Léger in *Hedley Lomas*: *op cit.* No 32, points 174 *et seq.*

[201] *Brasserie/Factortame III*: *ibid.*, par. 57.

[202] *Brasserie/Factortame III*: *ibid.*, par. 64. Also see the decision in *Factortame IV*: *op cit.* No 82, par. 141-153.

On the contrary, the sufficiently serious breach condition is not met automatically when the administration refuses to suspend the application of national measures which subsequently transpire to be illegal.[203] The opposite conclusion would paralyse administrative decision making and hinder the national authorities from the performance of their functions.[204] If the situation is so clear that the defendant should have realised the unlawfulness of its conduct, compensation will be paid anyway on the basis that the adoption of the contested measure constitutes a manifest disregard of the legal obligations imposed in this direction. The fact that the domestic authorities did not suspend its application will merely mean that the national treasury will be liable in the payment of damages sustained over a longer time period. If the illegality alleged by the applicant cannot be considered as sufficiently serious due to the uncertainty of the law in the area where the breach has been committed, the failure of the administration to proceed to the suspension of its allegedly unlawful conduct will also be regarded as excusable and the liability action will fail altogether.

b) Breaches consisting in the misinterpretation of substantive legal rules : The determination of the gravity of the infringement is more difficult when the violation consists in the misinterpretation and subsequent misapplication of the content of a substantive provision, rather than in the failure to comply with a legal standard imposing the obligation to proceed to a certain kind of conduct. There is little doubt that deliberate and knowingly committed breaches should always establish the grave degree of culpability required for the imposition of governmental liability. Notwithstanding this, proof of wrongful intent or knowledge does not constitute a necessary prerequisite for the payment of damages to the suffering individuals.

The right to compensation can thus arise, even if the defaulting authority has acted without consciousness of the illegality of its actions. There have certainly been cases, where the existence of good faith on the part of the wrongdoer led to the failure of the relevant damages action. However, this was only so because its

[203] *Brinkmann* : *op cit.* No 166, par. 32. Also the Opinion of Advocate General Cosmas, at point 34.
[204] Opinion of Advocate General Cosmas in *Brinkmann* : *ibid.*

creation was objectively justified on the basis of the general circumstances of the case and especially the degree of clarity and precision of the law in the field where the breach was committed. For example, in *BT* and *Denkavit* the action failed on the ground that the misimplementation of the measures involved in those cases was due to the mistaken but yet reasonable and adopted in good faith interpretation of their provisions by the domestic authorities.[205] In the absence of such an objective justification, any defence based on the existence of good faith does not suffice of itself to prevent the establishment of a sufficiently serious breach.[206] It is interesting at this point to refer to the decision of the High Court in *Factortame IV*.[207] It was accepted there that the defendant had adopted the inconsistent national legislation in good faith. However, this was not objectively justified on the facts of the case. As a result, a sufficiently serious breach was found to exist.

The question is thus to determine the specific circumstances, in which the misinterpretation of the law will not be objectively justified. This will certainly be so when the wording itself of the infringed legal norm is so clear and unambiguous, that its misunderstanding by the wrongdoer cannot be possibly excused. A good example is given by *Rechberger*.[208] The provision involved in that case was so clearly drafted, that its erroneous transposition satisfied evidently the sufficiently serious breach condition.[209] An identical conclusion was reached in *Lindöpark*[210], with regard again to a misimplementation breach.[211] From the moment that the clarity and precision criteria are met, it is not possible to deny the existence of a sufficiently serious breach on the basis that there was no guidance offered in this respect by the various political and judicial institutions. The conduct of these institutions is only relevant, to the extent that there is reasonable doubt around the meaning of the infringed legal norm.[212]

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[205] *BT*: *op cit.* no 28, par. 43-45 and *Denkavit* : *op cit.* no 140, par. 51-53.
[206] Also see the Opinion of Advocate General Fennelly in Cases C-397 & 410/98, *Metallgesellschaft Ltd. and others v. The Commissioners of Inland Revenue and HM Attorney General* [2001] ECR I-1727 at point 56.
[207] *Factortame IV* : *op cit.* No 82.
[208] *Rechberger* : *op cit.* No 141, par. 51. For more on this point, see the text corresponding to footnotes 195 *et seq.*
[209] Article 7 of Council Directive 90/314 : *op cit.* No 106.
[210] *Lindöpark* : *op cit.* No 142, par. 40.
[211] Council Directive 77/388 : *op cit.* No 143.
[212] *Lindöpark* : *op cit.* No 142, par. 41. In the same direction, the Opinion of Advocate General Jacobs, at points 73-74.

The existence of a sufficiently serious breach will also be established, when the situation in a given legal area has been determined beyond doubt by the case law. This will be so, even if the relevant pronouncements have been made with regard to a different case. It does not further matter whether this clarification has been provided for in a preliminary reference or in the context of an earlier enforcement action.[213] In *Brasserie* thus, it was declared that the prohibition on the marketing under the designation "*bier*" of imported beers that did not meet the purity requirements of the relevant national legislation contravened patently the principle of free movement of goods in the light of earlier decisions on the matter.[214] The clear implication was that its imposition constituted a sufficiently serious breach, that satisfied the culpability standard to give rise to public liability.[215]

Very interesting in this respect is the decision in *Larsy*.[216] The plaintiff had worked for a number of years as a nursery gardener in Belgium and France. He was originally granted in Belgium a full retirement pension, the amount of which was subsequently reduced on the basis that his right to the receipt of similar benefits had also been recognised in another country. He tried unsuccessfully to challenge this reduction in the competent national court and did not proceed to any further legal action, until after it was eventually established that domestic legislation may not prohibit the payment of overlapping benefits to persons that have worked during the same period in more that one countries and have been obliged to pay pension insurance contributions in all of them.[217] On the basis of this ruling, he requested from the competent social security body (*Inasti*) to be reinstated to his original pension entitlement. He was informed that such a review would require the submission of a new application. Following this, he was awarded a full retirement pension with effect only for the future. He then sought to receive damages from the *Inasti* for any loss suffered in the period between the reduction of his pension entitlement and its eventual reinstatement with a prospective effect. The defendant

[213] Also see the Opinion of Advocate General Tesauro in *Brasserie/Factortame III* : *op cit.* No 1, point 84 (b) and *BT* : *op cit.* No 28, point 36 (b). Also the Opinion of Advocate General Léger in *Larsy* : *op cit.* No 186, points 77-78.
[214] *Brasserie/Factortame III* : *ibid.*, par. 59.
[215] This was indeed the conclusion reached by the German Federal Supreme Court when the case returned to it for its final determination (see its decision of 24 October 1999, [1997] 1 CMLR 971, par. 13).
[216] *Larsy* : *op cit.* No 186.
[217] Case C-31/92, *Larsy v. Inasti* [1993] ECR I-4543.

submitted that the action should fail, on the basis of the absence of a sufficiently serious breach. It argued that the national rules did not permit it to review of its own motion the decision that had reduced the pension entitlement of the applicant. This could happen only following a specific request. The relevant application had been submitted outside the period provided for by Regulation 1408/71.[218] As a result, the review could only take effect for the future. There was not thus any wrongful act, that could give rise to the payment of damages to the plaintiff.

When the case was referred for a preliminary ruling, it was first clarified that the *Inasti* had acted erroneously by failing to reinstate with a retroactive effect the pension entitlement of the plaintiff.[219] It was then examined whether this failure could be considered as sufficiently serious to give rise to public liability. The violation complained of related in the first place to the failure of the defendant to comply with the authoritative power of previous case law, that entitled individuals paying pension insurance contributions in more than one countries to receive cumulatively the corresponding retirement benefits. To the extent that this was indeed so, it constituted automatically a sufficiently serious breach.[220] The question was nevertheless whether the defendant could be excused for thinking erroneously that the provisions of Regulation 1408/71 authorised it to limit the temporal scope of its review only for the future. There was no direct case law on the matter and regard had thus to be made to the clarity and precision of the applicable legislation. It was finally held that the wording and purpose of the involved legal norms was such, that could not justify any error of interpretation.[221] Thus, the mistaken reliance upon them had the necessary degree of gravity required for the payment of *Francovich* damages. The breach could not be justified on the basis of the existence of national procedural rules that the *Inasti* had to comply with for the pension entitlement of the applicant. The defendant was obliged to disapply any such inconsistent provision and to give practical effect to the requirements of the principle of supremacy.[222]

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[218] Article 95a (5) of Council Regulation No 1408/71/EEC of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation No 2001/83, as amended by Council Regulation No 1248/92/EEC (OJ 1992, L136/7).
[219] *Larsy* : *op cit.* No 186, par. 24-32.
[220] *Ibid.*, par. 43-45.
[221] *Ibid.*, par. 46-49.
[222] *Ibid.*, par. 50-53.

The situation differs, when there exists uncertainty as to the exact scope of the obligations that a given provision intended to impose on the public authorities. The gravity of the breach will depend then on the extent to which the interpretation given by the wrongdoer was indeed reasonable on the facts of the case. In *Brasserie*, it was accepted that the illegality of the prohibition on the marketing of beers containing additives was not very apparent at the time of its introduction and that the situation was not clarified until after its existence was established under the public enforcement mechanism.[223] The indication was thus offered that this specific infringement was not necessarily to be found as sufficiently serious.[224] In the same way, the plausibility of the interpretation given to the misimplemented provisions of the measures involved in *BT* and *Denkavit* was apparently the reason why the relevant breaches were considered as excusable.[225] However, reliance upon the good faith excuse is not possible when the conduct of the defendant is manifestly contrary to the whole range of interpretations that an ambiguous norm is open to.[226]

3.3.4. The existence of a direct causal link between the breach committed by the defendant and its effects on the applicant : The mere establishment of the existence of a sufficiently serious breach of the rights that the law intended to confer upon individuals does not suffice of itself to give rise to governmental liability. It is also necessary to show that the loss suffered by the plaintiff is actually due to the conduct of the central government, its constituent parts or its public emanations. If the result complained of would still have been the same, even in the absence of the wrongful act or omission committed by the national authorities, the required causal link will be missing and any liability action brought for the receipt of damages from the public funds will inevitably fail. The same will also be the case, if between the activity of the defendant and its effects on the applicant there is the intervention of another public or private actor that constitutes a more proximate cause of the sustained loss. This is because the payment of damages under *Francovich* is made

[223] *Brasserie/Factortame III* : *op cit.* No 1, par. 59.
[224] The German Federal Supreme Court ruled that this breach was indeed excusable (*op cit.* No 215, par. 17 *et seq.*).
[225] *BT* : *op cit.* No 28, par. 43-45. The misimplementation concerned Council Directive 90/531 : *op cit.* No 137. *Denkavit* : *op cit.* No 140, par. 51-52. The misimplementation concerned Council Directive 90/435 : *op cit.* No 143.
[226] In this respect, see the Opinion of Advocate General Tesauro in *Brasserie/Factortame III* : *op cit.* No 1, point 84 (c) and *BT* : *op cit.* No 28, point 36 (c).

dependent on the existence of a direct causal link between the unlawful activity that constitutes the basis of the relevant claim and the loss alleged by the applicant.[227] This means that it is not any remote consequence indirectly linked with the activity of a given national authority, that should be made good from the public treasury. The breach committed by the defendant should be so closely linked with the loss sustained by the plaintiff, as to be regarded its proximate cause.

The policy followed on this point is the one developed under the regime of Community liability.[228] However, it is not always easy to determine whether it is indeed the activity of a public authority that should be considered as the direct source of the damage complained of by the applicant. This is partly due to the scarcity of the guidance provided for in this respect by the case law. The matter is left to be decided almost in its entirety by the national courts according to the relevant arrangements of their domestic legal orders, provided that the applicable conditions comply with the principles of equivalence and effectiveness.[229] The problem is further accentuated by the diversity of the solutions proposed by the various legal theories as to the factors that should lead to the establishment of causality between a given act and its effects upon individuals.[230]

3.3.4.1. Determining the true author of the illegal act : National authority or Community institution ? : There are cases, where it is not immediately apparent whether the loss sustained by the plaintiff emanates from the activity of a national authority or a political institution. The problem is basically due to the fact that the implementation and application of Community law takes place principally through the national administrative mechanisms. It is thus often difficult to determine with certainty whether the damage suffered by the applicant is due primarily to the

[227] *Brasserie/Factortame III* : *op cit.* No 1, par. 51. However, if more lenient standards are provided for with regard to similar domestic law claims, the same measure of protection should also be extended to cases dealt with under *Francovich*.
[228] See in this respect Toth : *op cit.* No 64, pp. 191 *et seq.* Also see *Dumortier Frères* : *op cit.* No 73, par. 21, Case 26/74, *Roquette v. Commission* [1976] ECR 677, par. 21 *et seq.* and *Dorsch Consult* : *op cit.* No 113, par. 70 *et seq.*
[229] *Brasserie/Factortame III* : *op cit.* No 1, par. 65.
[230] The two basic theories developed in this direction are those of the equivalence of conditions and the adequate causality. The former (*Bedingungstheorie*) considers that all the elements that gave rise to the damage are equivalent. Any of them, without the existence of which the damage would not have occurred, is considered as the cause of the loss of the applicant. The latter theory considers that not all the causes of the damage play the same role in its realisation. Causality only exists when a given event is objectively capable, according to the normal course of things and the experience of everyday life, to give rise to the effect that has occurred. All other events connected with the damage are merely its occasions and not its causes.

adoption of an illegal legislative measure or rather to the erroneous application by the domestic authorities of an otherwise lawful common policy. The case law has tried to introduce a clear-cut distinction in this respect. It examines who actually enjoyed the decisive power with regard to the act that constitutes the direct source of the loss alleged by the plaintiff, so as to be considered the true author thereof.[231] The question asked in essence is whether the illegality constituting the basis of the liability claim stems from a national body or a political institution.

If the national authorities did nothing more than to give effect to binding instructions and to proceed to the faithful implementation and application of the law without enjoying any margin of discretion in the performance of their respective duties, any liability action should be directed against the institution that actually adopted the allegedly unlawful act.[232] The implementing bodies do not act illegally, when they have no choice other than to comply with the binding legislative will. The approach followed on this point is very well exemplified by *Asteris*.[233] The case arose from the adoption of legislation[234], which was later annulled as infringing the principle of equal treatment.[235] The applicants brought originally a liability action against the adopting institution, claiming the damages that they had sustained due to the entry into force of the unlawful measure.[236] When the case was decided, it was found that the defendant bore indeed responsibility for the illegality of the system of coefficients introduced by the annulled legal act. The action was nevertheless dismissed, on the basis that the violation complained of did not constitute a sufficiently serious breach of a superior rule of law.

The plaintiffs applied then in the national courts asking for a declaration that they were entitled to compensation with regard to the loss that they had sustained, due to the application by the domestic authorities of the unlawful measure. The

[231] Meij : 'Article 215 (2) EC and local remedies', in Heukels/McDonnell (eds.) : *op cit.* No 2, pp. 273-284, especially pp. 280-284, Oliver : 'Joint liability of the Community and the Member States', in Heukels/McDonnell (eds.) : *op cit.* No 2, pp. 285-309, especially pp. 299 *et seq.*, Lenaerts/Arts : *Procedural Law of the European Union*, Sweet & Maxwell, London 1999, pp. 251 *et seq.*, Schockweiler/Wivenes/Godart : *op cit.* No 18, pp. 66 *et seq.*

[232] Case 175/84, *Krohn v. Commission* [1986] ECR 753, par. 19 *et seq.*, Cases 106 to 120/87, *Asteris v. Greece* [1988] ECR 5515, par. 16 *et seq.*, *Mulder II* : *op cit.* No 84, par. 9. Also the Opinion of Advocate General Capotorti in Case 101/78, *Granaria v. Hoofdproduktschap voor Akkerbouwprodukten* [1979] ECR 623, at p. 644.

[233] *Asteris* : *ibid.*

[234] Commission Regulation No 1615/83 of 15 June 1983 fixing the coefficients to be applied to production aid for tomato concentrates and prunes and to the minimum prices for dried plums (OJ 1983, L159/48).

[235] Case 192/83, *Hellenic Republic v. Commission* [1985] ECR 2791.

[236] Cases 194 to 206/83, *Asteris and others v. Commission* [1985] ECR 2815.

question was whether this claim was affected by the answer given to the action that they had already brought against the adopting institution. The issue was referred for a preliminary ruling, where it was declared that a national authority which merely implements a given measure without being responsible for its unlawfulness may not be held liable on grounds connected with the illegality of the measure.[237] Any action against it can only be brought on other grounds, that is to say on the existence of a wrongful act or conduct in the performance of the public duties that it has been entrusted with.[238] The implication is clear. Any damage connected with the unlawfulness of the measure itself should be made good by the adopting institution. On the contrary, any loss sustained due to the erroneous application of the law by the domestic authorities can only be claimed against the latter.

When the loss of the applicant is due primarily to an autonomous decision taken by the national authorities in the wrongful exercise of the discretion left to them, it is no longer possible to argue that it is the activity of an institution that is at the origin of the damage complained of.[239] A very good example is given by *Borelli*.[240] The plaintiff had submitted an application under Regulation 355/77[241] to receive aid from the European Agricultural Fund. The Regional Council of Liguria issued an unfavourable opinion in respect of that request. On receipt of this information, the Commission notified the claimant that his project could not be admitted to the procedure for the grant of aid. The reason for that was that the local national authorities had disapproved it. The applicant decided then to challenge this decision and to claim damages for any loss that he had sustained as a result of the allegedly unlawful conduct of the institution that adopted it. His action was dismissed, on the basis that the unfavourable opinion of the national authorities was binding on the defendant.[242] The latter could not examine the project, unless it had already been approved by the country in the territory of which it would be carried

[237] *Asteris* : *op cit.* No 232, par. 18.
[238] *Ibid.*, par. 19.
[239] Case 133/79, *Sucrimex v. Commission* [1980] ECR 1299, par. 16 *et seq.*, Case 217/81, *Interagra v. Commission* [1982] ECR 2233, par. 8 *et seq.*, Case 109/83, *Eurico v. Commission* [1984] ECR 3581, par. 18 *et seq.*, Cases 89 & 91/86, *Etoile Commerciale and CNTA v. Commission* [1987] ECR 3005, par. 16 *et seq.*, Cases C-66/91 & C-66/91 R, *Emerald Meats v. Commission* [1991] ECR I-1143, par. 30 *et seq.*, Case C-97/91, *Borelli v. Commission*, [1992] ECR I-6313, par. 20-21.
[240] *Borelli* : *ibid.*
[241] Council Regulation No 355/77 of 15 February 1977 on common measures to improve the conditions under which agricultural products are processed and marketed (OJ 1977, L51/1).
[242] *Borelli* : *op cit.* No 239, par. 11

out. Furthermore, it did not have the competence to review the lawfulness of the relevant choice made by the local authorities. As a result, any irregularity in the opinion given by them could not affect the validity of the contested decision[243] and could not give rise to an action for damages on that ground.[244] Any claim had thus to be brought against the local authority, that issued the unfavourable opinion.

a) Distinguishing between legally binding orders and merely indicative suggestions : It is not always easy to determine the type of power exercised by the domestic authorities in the application of the law. This is especially so, when the national bodies have acted under the guidance of a given institution. In such circumstances, it needs to be established whether the instructions offered were actually binding or whether they constituted simply part of an internal cooperation. In the former scenario, the loss sustained by the applicant is not such as to give rise to the right to receive compensation from the national treasury.[245] The situation differs, if the implementing authority retained its autonomy of decision. In such a case, the mere fact that it chose to comply with the instructions of the intervening institution will not suffice of itself to break the chain of causation giving rise to a *Francovich* action.[246]

It might prove useful to compare at this point the decisions in *Krohn*[247] and *Sucrimex*.[248] These concerned the legal nature of telex messages sent to the domestic authorities. The plaintiffs were claiming damages, on the basis that these communications constituted legally binding acts which had led to the adoption at national level of measures affecting adversely their financial interests. In *Krohn*, the telex specified that the information supplied by the applicant for the issue of an import licence was insufficient for that purpose. On the basis of this communication, the customs authorities rejected the relevant request. The Court found that the defendant institution was not merely given the right to provide an opinion on the

[243] *Ibid.*, par. 12.
[244] *Ibid.*, par. 20-21.
[245] *Krohn* : *op cit.* No 232.
[246] *Sucrimex* : *op cit.* No 239, *Interagra* : *op cit.* No 239, *Eurico* : *op cit.* No 239, *Etoile Commerciale* : *op cit.* No 239, *Emerald Meats* : *op cit.* No 239, *Borelli* : *op cit.* No 239, Cases 12, 18 & 21/77, *Debayser v. Commission* [1978] ECR 553, Case 132/77, *Exportation des Sucres v. Commission* [1978] ECR 1061.
[247] *Krohn* : *op cit.* No 232.
[248] *Sucrimex* : *op cit.* No 239.

decision to be adopted by the domestic authorities. It was actually empowered to instruct them to refuse the requested import licences, where the conditions laid down in this respect had not been fulfilled.[249] It concluded thus that the unlawful conduct alleged by the applicant was not to be attributed to the customs authorities which were bound to comply with the instructions given to them, but rather to the institution that had sent the contested telex messages.[250]

In *Sucrimex*, the applicant was claiming export refunds from a national fund. The body responsible under national law for the payment of such refunds decided to ask for some guidance on this point from the Commission. Adopting the suggestions made by the latter, it went on to pay only the refund applicable on the days when the customs formalities were completed. This had the practical effect that the applicant received much less, than what it had actually requested. Unsatisfied with the outcome of its claim, it then purported to challenge the allegedly unlawful opinion of the intervening institution and to seek damages for any loss it had sustained as a result. The action was dismissed, on the basis that the application of the provisions on exports refunds is a matter exclusively for the national bodies appointed for this purpose.[251] The messages sent by the defendant did not have any legally binding force, but constituted merely part of the internal cooperation with the domestic authorities.[252] The loss complained by the applicant was not thus due to the opinion expressed by the defendant, but rather to the decision of the competent national body to ratify it.[253]

However, it may sometimes prove a very demanding and burdensome task for those wishing to claim damages for allegedly unlawful public activity to distinguish between legally binding directions and merely indicative suggestions. Very interesting in this respect is the decision in *KYDEP*.[254] The Commission had sent a telex message, informing the national authorities that no agricultural product exceeding certain maximum radioactivity tolerances could be regarded as satisfying the conditions for intervention buying in and for obtaining export refunds. The

[249] *Krohn* : *op cit.* No 232, par. 21-22.
[250] *Ibid.*, par. 23.
[251] *Sucrimex* : *op cit.* No 239, par. 16
[252] *Ibid.*, par. 22.
[253] *Ibid.*, par. 23.
[254] Case C-146/91, *KYDEP v. Council and Commission* [1994] ECR I-4199.

applicant claimed that this message constituted a legally binding act and wished to receive compensation for any damage that it had sustained, due to its adoption.

When the case reached its judicial determination, it was found that the telex at issue gave simply an interpretation as to what constitutes a sound, fair and merchantable product fit for human consumption, as provided for in accordance with the terms of the applicable at the time legislation.[255] This interpretation did not have the force of law and did not bind the national authorities.[256] It was nevertheless acknowledged that the telex was likely to prompt the domestic authorities to refuse to buy in for intervention agricultural products whose radioactivity exceeded certain maximum levels and to decline the grant of the corresponding export refunds. If a country chose to ignore the interpretation given by the defendant, it might expose itself to the risk of having the reimbursement of its expenditure incurred for the agricultural products in question refused.[257] *KYDEP* shows that an action against the Community may actually be possible, even when the intervening institution was in a *de facto* position to exercise a substantial pressure on the domestic authorities as to the way that they should give effect to the adopted common policies. It does not matter in this respect that its instructions were not strictly speaking of a legally binding nature.

b) The allocation of liability in case of breaches facilitated by the conduct of the institutions : It is finally asked whether the establishment of causality under *Francovich* can ever be interrupted by the failure of the institutions to exercise the powers that they possess with regard to the monitoring and enforcement of the correct application of the law by the domestic authorities. This can certainly not be the case, when the institution concerned enjoys a wide margin of discretion with regard to the performance of its supervisory functions or when it is apparent that even the proper exercise of its respective powers would not have affected necessarily the conduct of the defaulting national body. This is clearly the reason

[255] Commission Regulation No 1569/77 of 11 July 1977 fixing the procedure and conditions for the taking over of cereals by intervention agencies (OJ 1977, L174/15) and Commission Regulation No 2730/79 of 29 November 1979 laying down common detailed rules for the application of a system of export refunds on agricultural products (OJ 1979, L317/1).
[256] *KYDEP* : *op cit.* No 254, par. 25.
[257] *Ibid.*, par. 26.

why the failure to initiate enforcement proceedings cannot constitute a reason for holding the Community liable in damages.[258] The Commission possesses a wide discretion as to whether to initiate the relevant action.[259] Furthermore, the judgments delivered under this procedure are merely declaratory and do not provide any guarantees that the defendant will actually comply with them. As a result, the omission to bring proceedings under the public enforcement mechanism does not affect the establishment of a direct causal link with regard to the obligation to make good the loss that the activity of the domestic authorities has caused to individuals.

When the breach committed by the national authorities has been facilitated or even made possible by the failure of the institutions to perform the tasks entrusted to them, this might very well open the way to the initiation of a damages action against them. This will be especially so, if the defaulting institution approved expressly the inconsistent national measure permitting its application against individuals. An interesting example in this respect is given by *Kampffmeyer*.[260] Certain grain importers had applied to the domestic authorities for licences to import maize. Considering that a serious disturbance in the cereal market was threatened, it was decided to suspend all zero-rated import licences for maize. This ban had to be confirmed by the Commission. The latter gave indeed its authorisation, which was later on annulled as unlawful.[261] The affected grain importers decided then to bring a liability action claiming damages for any loss that they had suffered, due to the adoption of the illegal authorisation. The problem was that the cause of the sustained damage continued to lie partly with the domestic authority, that had adopted the measure in the first place. When the case was finally decided, it was acknowledged that the defendant institution could be indeed held liable for the wrongful authorisation of an illegal national measure. However, this liability was treated as secondary with regard to that of the domestic authorities and the applicants were required to bring their actions firstly in the national courts.[262] It thus appears that, when the damage sustained by individuals could have been prevented or at least

[258] Very characteristically, Case C-72/90, *Asia Motor France v. Commission* [1990] ECR I-2181, especially par. 13 *et seq.*
[259] Case 247/87, *Star Fruit Co. v. Commission* [1989] ECR 291.
[260] *Kampffmeyer* : *op cit.* No 68.
[261] Case 106 & 107/63, *Toepfer and Getreide-Import Gesellschaft v. Commission* [1965] ECR 405.
[262] *Kampffmeyer* : *op cit.* No 68, p. 266.

reduced, had the institutions concerned exercised correctly their monitoring and enforcement functions, what is actually established is a joint public liability that gives rise to interesting jurisdictional problems of allocation of responsibility and damages.[263]

3.3.4.2. The establishment of causality in case of breaches that can be attributed to various States : It will be sometimes possible to link the loss sustained by the applicant with the illegal activity of public authorities from more than one country. A very good illustration of some of the problems that may arise in such circumstances is provided for by *Aubin*.[264] The plaintiff was domiciled in Belgium but had his employment in France. When he was made redundant, he inquired in the country where he used to work about his rights to the receipt of unemployment benefits and was informed that he had to register as a job seeker in the country of his domicile. When he tried to exercise his relevant rights in this latter country, his claim was rejected by the competent national authorities. As he had now registered as a job seeker in the place of his domicile, it was decided that he was not entitled any more to claim unemployment benefits in the country where he used to work. Subsequent case law clarified that both national authorities involved in this case were actually wrong. Indeed, redundant workers are given the choice to register as job seekers and to claim the relevant unemployment benefits either in the place of their domicile or in that of their last employment. Following this clarification, Mr Aubin purported to bring a liability claim against France. His action succeeded, on the basis that he would not have registered as a job seeker in the country of his domicile in the absence of the inaccurate information originally given to him. The fact that between this breach and the loss complained of intervened the illegal refusal of the Belgian authorities to pay unemployment benefits was apparently not considered enough to break the required chain of causation.

Such cases are bound to give rise to considerable practical difficulties with regard to the determination of the specific authority, that the loss of the plaintiff is

[263] For more on this issue, Oliver : *op cit.* No 231.
[264] *Conseil d'Etat*, judgment of 20 June 1988 in *Aubin*, [1988] *Rec. Lebon* 20.

more closely related to. It would be unacceptable, if the complexity of the situation denied the applicant the right to receive an effective remedy from either body involved in the perpetration of the breach. The suffering individual should not be nevertheless allowed to receive multiple compensation for the same infringement, simply because his loss can be attributed to the illegal activity of more than one domestic authorities. The development of some case law on this point is probably necessary, in order to sort out the problems that may arise in this respect.

3.3.4.3. Causality in the intervention of a third party between the breach and its effects on the plaintiff : There are three basic scenarios, where the intervention of a private party in the process that gives rise to the loss of the applicant may create uncertainty as to the establishment of a direct causal link for the purposes of *Francovich*. On the one hand, the violation complained of may consist in the failure of the national authorities to monitor and enforce the proper application of the law. For example, it has been established that the combined effect of Articles 10 and 28 ECT imposes upon the governments the obligation to do their best to prevent private parties from posing obstacles to the free movement of goods.[265] The question is whether their failure to do so may expose them to liability actions brought by the affected importers. The problem is that the original source of the damage continues to be the illegal activity of private traders. It is not thus at all clear whether the breach committed by the national authorities can be considered direct enough to establish the necessary causal link. The issue is not substantially different from the one already dealt with, in respect of the failure of the institutions to ensure the respect of the law by the domestic administration. If any liability can arise in such circumstances with regard to the conduct of the public authorities, it will be joint with that of the defaulting private parties. It will be for the national courts to determine the exact allocation of responsibility.

On the other hand, the violation may consist in the failure to transpose measures that provide for the imposition of obligations on certain private parties. It is thus wondered whether it might be possible for the defendant in a *Francovich*

[265] Case C-265/95, *Commission v. France* [1997] ECR I-6959.

action to argue that there can be no direct causal link between its omission to proceeded to the adoption of the necessary implementing legislation and the loss sustained by the applicant, because it would still be for those parties to respect their obligations under the measure in order to ensure compliance with its provisions.[266] For example, consider an unimplemented measure that imposes upon employers the obligation to provide a certain benefit to a given category of employees. The question is whether *Francovich* liability can be denied, on the basis that the receipt of the benefit depended on the compliance of those employers with their respective obligations under the measure. An interesting decision in this respect has been delivered by the Northern Ireland High Court.[267] The applicant was working on a night shift and had asked her employer to be transferred to a day shift. When her request was rejected, she resigned on medical grounds and brought a governmental liability action claiming compensation for any injury resulting from the failure of the defendant to transpose in the domestic legal order the relevant legislation on the organisation of working time.[268] Her claim was dismissed on the rationale that it could not be possibly shown that her employer would have been forced to transfer her to day work, if she had been in a position to rely on the rights conferred upon her by the unimplemented measure.

A final scenario where similar problems may arise is when the domestic legislature introduces or retains in force inconsistent national legislation, the reliance upon which by a third party causes loss to a given individual. In the first place, it is asked whether the institution of a *Francovich* action is permissible in such circumstances, despite the possible availability in the national courts of an alternative course of action against the party acquiring benefits from the application of the unlawful domestic provisions.[269] This is a question that has not found yet its answer in the case law. Even more difficult problems arise in the converse case, when the party benefiting from the existence of the national legislation attempts to rely upon *Francovich* in order to recover everything that it was obliged to pay to the

[266] In this direction, Smith/Woods : 'Causation in Francovich : The neglected problem', (1997) 46 *ICLQ* 925, pp. 933-934 and Prechal : *op cit.* No 28, p. 332.
[267] *Re Burn's Application for Judicial review*, decision of 15 March 1999, (1999) The Northern Ireland Law Reports 175.
[268] Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993, L307/18).
[269] *Supra* 1.4.2.3.

affected individuals as a result of a domestic law action brought against it in the national courts.[270] It could be argued that it might be difficult to establish the existence of a direct causal link in such circumstances. However, such a possibility should not be excluded. The *Cour du Travail de Liège* accepted thus the action in intervention and guarantee brought against Belgium by an employer, who had been condemned in the payment of compensation to a female employee for applying against her national legislation contravening the principle of sex equality. The court considered that it was the retention of the unlawful domestic provisions that permitted the reliance made upon them in good faith by the applicant.[271]

3.3.4.4. The conduct of the plaintiff as a factor affecting the chain of causation : The applicant may also be denied the payment of compensation, to the extent that his loss is partly or wholly due to his own negligent conduct. This is nothing more than a simple transposition in the field of governmental liability of a principle, that has been originally introduced with regard to the payment of damages for the illegal activity of the political institutions.[272] Its operation is based on the omission of the plaintiff to take reasonable measures of care, in order to prevent the establishment and increase of his damage.[273] The failure to use in time any effective legal remedies available in the national courts constitutes a very good example of conduct that contravenes the principle of good faith.[274] This issue has already been dealt with as a factor affecting the admissibility of the damages actions.[275] It is nevertheless clear that it also has repercussions for the establishment of the causal link under *Francovich* and the determination of the quantum of damages finally payable to the affected individuals.

For example, consider that the plaintiff did not apply for the provision of interim protection to his infringed legal rights. In such circumstances, he should not be entitled to receive any damages causally linked with his failure to do so. Between the breach committed by the public authorities and the effects arising therefrom,

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[270] *Ibid.*
[271] *Cour du Travail de Liège*, judgment of 6 April 1995, (1995) *Chronique du Droit Social* 337.
[272] *Mulder II* : *op cit.* No 84, par. 33.
[273] *Brasserie/Factortame III* : *op cit.* No 1, par. 84.
[274] *Ibid.*
[275] *Supra* 1.4.1.

there is the intervention of the negligent conduct of the applicant that contributes to the establishment of the sustained loss. Certainly, the dividing line between diligence and negligence is not always clear and it will be for the national courts to draw it on the facts of each given case. However, the measure of care required by the plaintiff should not be such as to amount in practice to an infringement of the principles of effectiveness and effective judicial protection. In *Dillenkofer*[276], the mere fact that the plaintiff had chosen to pay the whole value of his travel price before obtaining the relevant travel documents was not considered as constituting contributory negligence. It did not matter in this respect that he did not avail himself of the possibility offered by the domestic legislation to give only a small deposit.[277]

3.3.4.5. Causation in case of damages that might have been sustained even in the absence of the breach alleged by the applicant : The establishment of a direct causal link will also be difficult in those cases where it is not immediately clear that the result complained of would not have occurred anyway, even if the domestic authorities had adhered completely to their respective legal obligations. Suppose that the violation consists in the failure to implement in time a measure setting the minimum standards that building constructors should comply with. A building constructed according to the lower standards of the national legislation collapses as a result of a powerful earthquake. It will be then a very challenging task to show that the damage would not have been the same, had the measure been properly implemented and its requirements complied with by the legal subjects that its provisions are addressed to. In such circumstances, *Francovich* provides a possible course of action to the suffering individuals but this does not necessarily mean that it will also lead to the imposition of monetary liability for the infringement of legal requirements the respect of which might not have prevented the loss of the applicants from actually being sustained.

It is especially with regard to two kinds of breaches that such an uncertainty is bound to arise in practice. The first category comprises violations taking place in

[276] *Dillenkofer : op cit.* No 51.
[277] *Ibid.*, par. 69 *et seq.*

the field of competition law. The problem consists in the fact that it is not at all easy to determine whether the loss sustained by a given market participant is due indeed to an illegal public activity or rather to the existing market conditions and the efficiency of competing undertakings. It is difficult thus to establish that the unlawful public aid provided to a given competitor or the enactment of national legislation that favours public undertakings is indeed the reason for the failure of the plaintiff either to enter the market or to keep and increase its respective business share in it.[278] The situation might still have been the same, even if the domestic authorities had not infringed their respective legal duties. What the applicant actually alleges in such circumstances is the loss of a potential chance to secure a better market result. It is to be doubted whether this will suffice for the payment of damages from the national treasury. Certain inferences in this respect can be drawn from the case law in the field of Community liability. It has been thus established there that the alleged preferential treatment of a given undertaking by the political institutions may not be considered of itself as the direct cause of any damage sustained by its competitors, as to give rise to the right of the latter to seek its reparation through the institution of the corresponding public liability proceedings.[279]

The same holds equally true with regard to procedural law violations. It is often difficult to show that the result complained of would have been different, had the correct procedure been followed by the domestic authorities. A case decided by the English Court of Appeal clearly demonstrates why this may be indeed so.[280] The liability action was brought on the basis of the violation by the Home Secretary of its obligation to await for the report of the competent authority, before deciding to make an exclusion order. The evidence nevertheless showed that this report would not have had any substantial impact on the unfavourable for the plaintiff decision. The breach was thus considered as purely technical and could not be linked with any damages claimed by the applicant.

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[278] In this respect, see especially Smith : 'The Francovich case : State liability and the individual's right to damages', (1992) 13 *ECLR* 131. Also see Bell : 'Enforcing Community law rights before national courts - Some developments', (1994) 21 *LIEI* 111, at p. 121.

[279] *Roquette* : *op cit.* No 228, par. 23.

[280] *Regina v. Secretary of State for the Home Department, ex parte John Gallagher* [1996] 2 CMLR 951.

3.3.4.6. Causality in the existence of multiple breaches committed by the defendant : Similar problems may arise where there exist more than one violations attributed to the national authorities, not all of which can be considered to be sufficiently serious. In such a case, it is becoming indispensable to determine the breach that actually gave rise to the loss of the applicant and to ascertain whether it has the necessary degree of gravity required to give rise to the right to receive compensation. Much criticism in this respect has been exercised against the decision in *Brasserie du Pêcheur.*[281] Following the suggestions made on this point in the context of an earlier preliminary ruling[282], the *Bundesgerichtshof* concluded that only the violation concerning the prohibition on the use of the designation "*bier*" could be considered as sufficiently serious. On the contrary, the prohibition on the importation of beers containing additives constituted an excusable breach. It was further added that all the measures adopted against the plaintiff aimed exclusively at dealing with contraventions of the latter prohibition. There was consequently no direct causal link between the loss complained of and the prohibition on the marketing under the designation beer of products manufactured according to rules other than those applying in the importing country. As a result, the action failed on the basis of the failure of the applicant to establish a direct causal link between the sufficiently serious breach and the damage sustained by it.

The contestable reasoning followed by the *Bundesgerichtshof* gave rise to academic comment that the flexibility shown by the case law on the causation issue provides the national judges with the opportunity to exonerate the public treasury from any liability, when the loss of the applicant can be potentially linked with more than one violations committed by the domestic authorities.[283] Even if the plaintiff meets the sufficiently serious breach hurdle, his prospects of receiving compensation under *Francovich* may be thus seriously compromised by the arbitrary exercise by the courts of the excessive discretion left to them with regard to the determination of causality. The absence of guidance in this field can be possibly interpreted as a violation of the principles of effectiveness and effective judicial protection. This

[281] *Brasserie du Pêcheur v. Germany* : *op cit.* No 215.
[282] *Brasserie/Factortame III* : *op cit.* No 1, par. 59.
[283] Especially see Deards : '*Brasserie du Pêcheur* : Snatching Defeat from the Jaws of Victory ?', (1997) 22 *ELRev* 620, pp. 624-625. Also Oliver : (1997) 34 *CMLRev* 635, pp. 656-657.

gives rise to the obligation to proceed to the introduction of minimum uniform standards on matters of causation.

3.3.4.7. Causality in the context of the appropriate defendant problem : Even if the damage complained of can be causally linked with an illegal public activity, it might still be necessary to determine the exact domestic authority that it primarily emanates from. The problems that arise in this respect have already been dealt with elsewhere.[284] Suffice it simply to recall here that this issue is considered as falling within the principle of national procedural autonomy. Any judicial intervention is thus confined only to the extent that this is required by the principles of effectiveness and equivalence.

[284] *Supra* 2.4.

Chapter Four : Procedural and remedial law issues and the prohibition of discrimination under the principle of equivalence.

4.1. Introduction : By setting itself certain of the conditions that determine the right of individuals to receive compensation for breaches committed by the domestic authorities, the *Francovich* case law has specified what must be considered as an effective standard of protection in the respective areas. This is especially so as concerns the measure of culpability, that has to be established by the plaintiff. Any national rule that goes beyond these minimum requirements should be rendered automatically inapplicable. Suffice it to recall at this point the findings that national provisions making a legislative breach referable to an individual situation[1] or requiring proof of misfeasance in public office[2] exceed what is permissible in this respect and should not thus apply under the doctrine. This does not mean that national law is left without any say on the determination of the conditions for the application of *Francovich*. Any uniform standards introduced in this direction apply only in the absence of national rules more favourable for individuals, since the principle of equivalence places the courts under the obligation to extend automatically the application of such rules to damages actions brought under the doctrine.[3] Matters such as the establishment of causation are also left almost entirely to national law, subject to the effectiveness and equivalence provisos.[4]

It is further clear that the harmonisation of the liability standards that has been attempted in the field under consideration is not only minimum but also partial, in the sense that it only covers certain conditions of a substantive nature leaving aside matters of procedure and quantification of the loss. Subject to the existence of a right to receive compensation under the conditions specified by the case law or the more favourable ones possibly provided for at national level, it is on the basis of the rules of national law on liability that the courts must make reparation for the

[1] Cases C-46 & 48/93, *Brasserie du Pêcheur v. Germany and R. v Secretary of State for Transport ex parte Factortame* [1996] ECR I-1029, par. 71.
[2] *Ibid.*, par. 73.
[3] *Ibid.*, par. 66.
[4] *Ibid.*, par. 65.

consequences of the loss and damage caused to individuals.[5] It is thus for the domestic legal orders to set the detailed procedural conditions for effectuating the respective right to reparation and to specify the rules that will determine the extent of the compensation due to the plaintiff. However, the adopted solutions should not discriminate against claims based on *Francovich* and should not undermine the effective operation of the doctrine.[6] A distinction is thus drawn between conditions of a substantive and a procedural or remedial nature. The former are governed by harmonised criteria and apply to the extent that national law does not provide for more favourable liability standards. The latter are still left to the domestic legal orders, subject to the application of the equivalence and effectiveness principles.

4.2. The reliance made on national law with regard to procedural and remedial issues and its restriction under the effectiveness principle : Contrary thus to the minimum harmonisation that has taken place at the substantive law level, the procedural and remedial rules for the application of the doctrine continue to be regulated by the various domestic legal orders.[7] Their operation is made nevertheless subject to the respect of the equivalence and effectiveness principles.[8] The deference shown to national procedural law is certainly understandable, in view of the absence of relevant uniform rules on the issue. It is founded on the premise that countries based on the rule of law will organise their national legal systems in a way, as to ensure the proper application of the law and the adequate legal protection of their subjects.[9] It has the advantage that it allows to deal progressively with any practical problems that arise from the enforcement of the substantive legal rights and to specify through the case law minimum standards of effectiveness with an *erga omnes* effect. Notwithstanding this fact, the disparity that characterises the national procedural and remedial rules can undermine seriously the uniform application of the law, regardless of whatever harmonisation of substantive conditions has possibly

[5] Cases C-6 & 9/90, *Francovich and Bonifaci v. Italy* [1991] ECR I-5357, par. 42. For a fairly recent appearance of this statement, see Case C-424/97, *Salomone Haim v. Kassenzahnärztliche Vereinigung Nordrhein* [2000] ECR I-5123, par. 33.
[6] *Francovich* : *ibid.*, par. 43
[7] *Ibid.*, par. 42-43.
[8] *Ibid.*, par. 43.
[9] Opinion of Advocate General Jacobs in Cases C-430 & 431/93, *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v. Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR I-4705, point 30.

been attained. At the same time, the vagueness surrounding the effectiveness principle and the fragmentary development of the relevant case law makes it often difficult to ascertain whether a given national standard offers the requisite degree of protection or whether it should be modified in order to reach the minimum effectiveness requirements. The legal uncertainty created as to what qualifies as an effective standard of protection impedes the full effect of the law and may hinder individuals from relying on the substantive rights, that the latter intends to confer upon them.[10]

It is thus necessary to undertake as extensive an examination as possible of the various judicial pronouncements made on the scope and application of the effectiveness principle and to attempt an analysis of what is actually accepted or prohibited under it, for the purposes of governmental liability actions. It might be convenient in this respect to distinguish between conditions regulating the access to the judicial process and the institution of the relevant liability proceedings and rules concerning the quantification of the compensation due and the form that the reparation may actually take. However, it is first required to ascertain the general criteria on the basis of which the national courts will be called upon to assess the adequacy of the domestic arrangements for the effectuation of the right of individuals to receive redress under *Francovich.*

4.2.1. The criteria for measuring the effectiveness of national procedural law : The principle of effectiveness prohibits national rules, that render virtually impossible or excessively difficult the exercise of the legal rights of individuals. The national courts are thus obliged to look at the practical effect of a given provision, in order to determine whether it offers individuals sufficient opportunities to ensure the enforcement of those rights and their respect by both private parties and public law bodies. It now appears that the reasonableness of the restrictions imposed by domestic procedural rules must be analysed by reference to the role of that provision

[10] For a detailed discussion of the reasons that underlie this continuing reliance on the domestic solutions on procedures and remedies and the advantages and disadvantages that this policy entails in practice, see Bridge : 'Procedural Aspects of the Enforcement of European Community Law through the Legal Systems of the Member States', (1984) 9 *ELRev* 28, Tash : 'Remedies for European Community Law Claims in Member State Courts : Toward a European Standard', (1993) 31 *CJTL* 377, Himsworth : 'Things Fall Apart : The Harmonisation of Community Judicial Protection Revisited', (1997) 22 *ELRev* 291.

in the procedure, as well as to its progress and its special features.[11] This implies the need for the adoption of a purposive approach towards the principle of effectiveness, focusing on the examination of the reasons for the application of a specific rule in the context of a given case. The aim is to determine whether the restriction imposed by national law can be considered as reasonable and justifiable.[12] It is thus clear that effectiveness should not be interpreted in a way as to require the automatic setting aside of any procedural rule, that places some kind of limit in the way that a given claim can be pursued in the national courts. The opposite would disturb certain important domestic principles, that are currently considered as worthy of judicial protection.[13] The interest in the full application of the law needs thus to be balanced against certain competing national interests, which are sometimes referred to as hallmarks of procedure.[14] The case law has made explicit reference in this respect to the protection of the rights of defence, the principle of legal certainty and the proper conduct of procedure.[15]

The conclusion drawn seems to be that the examination of the effectiveness principle takes place on an *ad hoc* basis, by having regard to the particular characteristics and the whole judicial history of a given litigation. It is thus possible that similar procedural rules might be treated in a differentiated way, depending on the factual scenario involved. This approach has certainly the advantage of leading to solutions more closely tailored to each individual case, but leaves the national courts with the task of making difficult factual and policy assessments.[16] This can possibly lead to the aggravation of the legal uncertainty of individuals as to the extent of the rights that the law intended to confer upon them. Generally unobjectionable national rules may thus be found as contravening the effectiveness principle, due to the exceptional circumstances surrounding their application in a

[11] In this direction, see especially Case C-312/93, *Peterbroeck, Van Campenhout & Cie SCS v. Belgian State* [1995] ECR I-4601, par. 14.
[12] Hoskins : 'Tilting the Balance : Supremacy and National Procedural Rules', (1996) 21 *ELRev* 365, pp. 372 *et seq.*, De Burca : 'National procedural rules and remedies : The changing approach of the Court of Justice', in Lonbay/Biondi (eds.) : *Remedies for Breach of EC Law*, Wylie 1997, pp. 37-46, especially pp. 45-46.
[13] In this respect, see especially the Opinion of Advocate General Jacobs in *Van Schijndel* : *op cit.* No 9, points 24-44. Also see Jacobs: 'Enforcing Community rights and obligations in national courts : Striking the balance', in Lonbay/Biondi (eds.) : *ibid.*, pp. 25-36, at pp. 26-27.
[14] Afilalo : 'How far Francovich ? Effective judicial protection and associational standing to litigate diffuse interests in the European Union', *Harvard Jean Monnet Working Paper* 1/98.
[15] *Peterbroeck* : *op cit.* No 11, par. 14. Also *Van Schijndel* : *op cit.* No 9, par. 19.
[16] De Burca : *op cit.* No 12, pp. 45-46, Hoskins : *op cit.* No 12, pp. 375-376.

specific legal context. To give an example, there is generally no objection to rules prohibiting the national courts from taking into account of their own motion arguments that have not been put forward by the parties within a reasonable limitation period.[17] The setting aside of the relevant prohibition may be nevertheless required in circumstances where the case has reached the first stage of its judicial determination after the expiry of the prescribed deadline, following a previous administrative procedure.[18] This is based on the rationale that the operation of the respective procedural rule in such circumstances would bar completely the national judges from raising legal points in the context of a given trial. Such a restriction does not thus appear to be reasonably justifiable by principles such as the requirement of legal certainty and the proper conduct of procedure.[19]

The converse is also possible. A procedural rule that seems to go beyond what would normally be acceptable under the case law might nevertheless escape the application of the effectiveness principle in a given situation, if the plaintiff is given reasonable chances to pursue successfully his claim through alternative legal means. A very good example in this respect is given by procedural rules restricting the use of certain forms of evidence. It has thus been accepted that the prohibition on the use of witnesses in damages actions against the public authorities may not be considered objectionable on the facts of a given scenario, if the national court concludes that the applicant had the possibility to prove his claim in other ways, especially through recourse to written documents.[20] Exactly the opposite will be the case, if the calling of witnesses is critical to the case of the plaintiff and the latter is prevented from using such evidence. The national prohibition will contravene then the requirements of effectiveness and will thus need to be set aside.

A second conclusion that can be possibly drawn from the judicial approach on the assessment of the effectiveness principle is that an implicit distinction seems to have been introduced between two kinds of procedural rules, depending on whether their application implicates or not important hallmarks of procedure.[21] It

[17] *Van Schijndel* : *op cit.* No 9. The obligation to proceed to the *ex officio* application of the law exists, only when the courts are placed under the obligation or are left with the discretion to do so with regard to similar domestic claims (par. 13-15).
[18] *Peterbroeck* : *op cit.* No 11. For a criticism against the decision in this case, see Hoskins : *op cit.* No 12.
[19] *Ibid.*, par. 20.
[20] Case C-228/98, *Charalambos Dounias v. Ypourgos Oikonomikon* [2000] I-ECR I-577, par. 71.
[21] In this respect, especially see Afilalo : *op cit.* No 14.

appears that domestic provisions imposing procedural restrictions in the interests of legal certainty, the rights of defence and the proper conduct of proceedings might be accepted more easily than those that do not give rise to similar considerations. It may thus prove more difficult to strike down procedural rules regulating issues such as limitation periods, the *ex officio* application of the law and the principle of *res judicata* than others concerning matters such as the jurisdiction of the courts and the forms of evidence that the applicant may have recourse to in the context of a given litigation. It has also been suggested that the case law seems to be rather receptive towards provisions, that intend to regulate in a reasonably balanced way the legal position of the parties involved in the judicial proceedings and to penalise those who do not adhere to the rules of the litigation game.[22] A classical example in this respect is given by the national rules on limitation periods. To the extent that they prescribe reasonable deadlines for the initiation of proceedings, they aim to strike a fair balance between the right of the plaintiff to pursue his claim and the general interest to put a quick end to the legal uncertainty created by the alleged violation of the principle of legality. National law cannot thus be reproached for penalising those who disregard this objective and bring their actions outside the prescribed limitation period, by providing for the total or partial negation of the protection that they would otherwise have been entitled to under a given legal provision.

It also needs to be noted that the principle of effectiveness goes beyond the field occupied by procedural and remedial rules and extends also to the stage of the enforcement of the sanctions imposed for breaches of substantive legal obligations.[23] If its operation ceased at the moment of the judicial determination of the right to a legal remedy specific in form and amount, it would still be possible for national law to undermine the adequacy of the protection offered by placing obstacles to the actual receipt of the redress that the applicant would be entitled to. In the field of governmental liability, this could possibly happen through the recognition of extensive privileges and immunities with regard to public goods. One could think especially in this respect of rules prohibiting the execution against the

[22] *Ibid.*
[23] Very correctly in this respect, Lenaerts/Arts : *Procedural Law of the European Union*, Sweet & Maxwell 1999, p. 72.

public property of judicial decisions imposing liability for breaches committed by the domestic authorities. Even if they do not favour claims of a domestic nature, such restrictions are still capable of rendering devoid of substance any judicial protection offered to individuals and need thus to be measured against the requirements of the effectiveness principle.

4.2.2. Effectiveness and rules specifically introduced to restrict judicial claims :
A very important question arising in this respect is whether and under which circumstances the principle of effectiveness may impose the obligation to refrain from the modification of national procedural law, when this would make it more difficult for individuals to seek the judicial protection of their infringed legal rights. A relevant pronouncement on this point has been made with regard to limitation periods for the repayment of unlawfully levied charges.[24] It has thus been declared that the legislature may not adopt a procedural rule which specifically reduces the possibilities of bringing proceedings for the repayment of charges levied though not due, following a judgment delivered under the preliminary reference procedure or the public enforcement mechanism that establishes the illegality of the national legislation on the basis of which this unlawful collection has been made.[25] This shows an intention to respect the *status quo ante* as to the right to bring proceedings against unlawful national practices and a wish to prevent the chances of judicial success from being undermined due to the modification of domestic procedural law exactly at the moment when the existence of the illegality is made apparent.[26]

There are various points that need to be made about this *Deville* principle. With regard to its scope of application, it seems that its underlying rationale holds good in respect of all kinds of procedural rules, regardless of the type of action brought by the applicant. It is thus also applicable to any modification of the law specifically designed and capable to frustrate the chances of individuals to receive compensation for breaches committed by the domestic authorities. As to the

[24] Case 240/87, *Deville v. Administration des Impôts* [1988] ECR 3513, Case C-231/96, *Edilizia Industriale Siderurgica Srl (EDIS) v. Ministero delle Finanze* [1998] ECR I-4951, par. 13 *et seq.*, Case C-228/96, *Aprile v. Amministrazione delle Finanze dello Stato* [1998] ECR I-7141, par. 23 *et seq.*, Case C-343/96, *Dilexport Srl v. Amministrazione delle Finanze dello Stato* [1999] ECR I-579, par. 34 *et seq.*
[25] *Deville* : *ibid.*
[26] In this direction, see the Opinion of Advocate General Ruiz-Jarabo Colomer in *Dilexport* : *op cit.* No 24, at point 35.

conditions that govern its operation, the conclusion seems to be that it always comes into play when three cumulative criteria are met.[27] The national legislation must have been amended precisely at the moment, when the unlawfulness of the activity of the domestic authorities is established either in the context of enforcement proceedings or following a preliminary ruling. The modification of the law must relate to the specific rules and practices, that have been found illegal by the case law. The satisfaction of claims directed against these inconsistent national rules and practices must finally be subjected with a retroactive effect to less favourable standards than the ones that would have applied, if the new law not been promulgated. The combined effect of the above must be such, as to undermine the prospects of success of individuals bringing proceedings under the new legal regime against illegal activities already committed before its introduction.

This does not nevertheless impose an obligation to freeze the anterior legal regime, as to prohibit any modification to it by the legislature. This is so, even when the timing of the promulgation of a new law is rather dubious due to the existence of relatively fresh case law establishing the existence of a given violation. There will be accordingly no objection to it, if the amendment takes a general form and leaves sufficient opportunities to individuals to receive effective judicial protection of their infringed legal rights.[28] It has thus been declared with regard to limitation periods that their modification will be in any event permissible, subject to the satisfaction of two requirements. It must first constitute a generalisation of an already existing legal regime, aiming at the standardisation of the law in a given area. It must also allow the applicants to bring their claims within a reasonable limitation period, that commences from the adoption of the amended legislation rather than the moment of the perpetration of the breach.[29] This implies a possibility to introduce more stringent procedural standards, provided that the right of individuals to receive redress for infringements committed under the anterior legal regime is not made impossible or excessively difficult.

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[27] These conditions seem to arise from the judicial pronouncements in *EDIS* : *op cit.* No 24, par. 24 and *Aprile* : *op cit.* No 24, par. 28 *et seq.* In the same direction, also see the conclusions of Advocate General Ruiz-Jarabo Colomer in *Dilexport* : *ibid.*, points 35 *et seq.*

[28] *Aprile* : *ibid.*, par. 28 *et seq.*, *Dilexport* : *ibid.*, par. 40-42.

[29] *Aprile* : *ibid.*, *Dilexport* : *ibid.*

It is less clear how effectiveness will be interpreted with regard to the modification of other kinds of procedural rules. It is also uncertain whether a modification of domestic procedural law may still be considered as objectionable, even in the absence of one of the three conditions governing the application of the *Deville* principle. Consider the case where national law provides for the payment of interest at a certain rate in all types of civil liability actions, regardless of the status of the defendant under them. Following a judgment establishing the illegality of the national legislation intending to transpose a given measure in the domestic legal order, a new law is passed that provides for the payment of interest at a different rate in respect of damages actions against the public authorities. The new rate is reasonable but lower than the one that would have applied, had the national legislation not been amended. The modification of the law has a general character and can be seen as a means of standardising the rules in the field of public liability. The problem is that it applies even to persons that have suffered loss before its promulgation, reducing thus the amount of compensation that the latter will actually receive. The question in this case is whether such an effect is objectionable under the effectiveness principle, despite the fact that the new interest rate is not unreasonably low. Similar problems arise with regard to many other procedural rules and some clarification on these points by the case law would certainly be particularly welcome.

4.2.3. Determining the standards of effectiveness under the various procedural aspects of public liability actions : It is for each national court to determine whether a given procedural arrangement satisfies the effectiveness requirements as to the measure of protection that it offers to individuals. The discretion that the judges enjoy in this respect is nevertheless circumscribed by the fact that the case law under the preliminary reference procedure often specifies itself whether a certain domestic rule goes beyond the limits of any procedural and remedial autonomy still possessed by the national legal orders. This clarification has a general binding effect and operates as precedent for all similar future cases, even if their factual and legal

characteristics do not exactly coincide.[30] This leads to the progressive creation of a judicial body of law, that lacks the coherence of the codified legislative sources. Notwithstanding this fact, its practical effect is to provide binding guidance as to the specific types of national procedural rules that may fail to receive the seal of approval of the effectiveness principle. On the basis of what has already been decided in this respect, it is thus possible to draw some useful conclusions as to what qualifies as effective with regard to the various procedural aspects of public liability actions. The same is possible also as concerns the measure and form of reparation that has to be made available to the applicants.

4.2.3.1. Procedural rules regulating the access to and the performance of the public liability proceedings : The case law that will be referred to in this section has not always developed in respect of damages claims. The solutions adopted under it can nevertheless serve also for the imposition of governmental liability for breaches committed by the national authorities in the performance of their functions.

a) Bodies having the competence to deal with public liability claims : Provided that the principle of equivalence is met, the domestic legal orders are left with a great latitude to designate the bodies having the jurisdiction to hear public liability actions. This constitutes nothing more than the consequence of the jurisdictional discretion enjoyed in the context of the principle of national procedural autonomy.[31] It is thus for each national system to determine whether reparation will be sought from the ordinary or the administrative courts, without prejudice to the possibility to subject governmental liability actions to the jurisdiction of specialised judicial bodies. It is nevertheless necessary in certain exceptional cases to interfere with the division of jurisdiction at national level, in order to guarantee that individuals are

[30] The previous rulings on similar points of law can be relied upon by national judges in all future litigations, without the need to make a reference under the preliminary ruling procedure (Case 283/81, *Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health* [1982] ECR 3415, with regard to rulings on interpretation and Case 66/80, *International Chemical Corporation v. Amministrazione delle Finanze dello Stato* [1981] ECR 1191, with regard to rulings on validity). The implication seems to be that the national courts may not decide a case in a way contrary to the one that it has already been dealt with in a past preliminary ruling, unless the same question is referred again and a different answer is given to it. This amounts to the creation of a system of *de facto* precedent with regard to the past judicial pronouncements made under the preliminary reference procedure.

[31] Case 33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland (Rewe I)* [1976] ECR 1989.

given reasonable chances of securing the protection of their affected rights. A very good example of such an interference is given by the requirement that the resolution of the dispute should always at some point be made open to a certain kind of judicial control, even if it needs to undergo a previous administrative stage. The national legal orders are not thus precluded from subjecting the resolution of public liability actions to an administrative, rather than a judicial procedure.[32] If they choose to do so, they will be nevertheless obliged to provide the plaintiff with the opportunity to challenge judicially the decision of the competent administrative authority. It is only in such a case, that the principle of ultimate judicial control over the exercise of public power is finally satisfied.[33] The opposite would constitute a violation of the principle of effective judicial protection and would fail thus to meet the effectiveness standards set by the case law.[34]

An interesting question that is still left unanswered is whether the principle of effectiveness can require the modification of the domestic arrangements on the division of jurisdiction, when there are doubts about the impartiality of the body that would be normally called upon to decide a given litigation. In the field of public liability actions, such problems may arise in two basic situations. The most likely one is with regard to judicial breaches. In such cases, the judge belongs in the same judicial system as the wrongdoer and is sometimes hierarchically inferior to him. Given the highly sensitive nature of the issues underlying the imposition of public liability for judicial breaches, it is to be expected that a rather reserved approach will be probably adopted as to the division of jurisdiction between the national courts. Similar concerns may also arise when the resolution of the dispute is subjected to an administrative procedure, in the context of which the competent domestic authority is called upon to rule on the legality of actions that have taken place with some kind

[32] This is the case in the context of the Spanish public liability system. Those wishing to claim damages from the public funds should first bring their claim before the competent minister. It is only after the minister has rejected the claim or has not responded to the applicant within six months after the filing of the request that a damages action can be finally brought in the national courts. See Bribosia : 'Le Droit Espagnol', in Vandersanden/Dony (eds.) : *La Responsabilité des Etats Membres en cas de Violation du Droit Communautaire*, Bruylant 1997, pp. 183-233, at pp. 188-190.

[33] In this respect, consider the decision in *Dounias* : *op cit.* No 20. One of the questions asked under the preliminary reference procedure was whether it is precluded for national law to provide that disputes concerning the levying of taxes on imported products are to be settled by an administrative procedure. One of the conditions that was set in order for such a provision to be acceptable was the possibility of exercising a judicial remedy against the decision of the competent administrative authority (par. 64 of the judgment).

[34] Case 222/86, *UNECTEF v. Heylens* [1987] ECR 4097, par. 14, Case C-18/88, *RTT v. BB-Inno-BM* [1991] ECR I-5941, par. 34.

of direct or indirect involvement on its part. In this latter category of cases, it could be suspected that it might be required from the administrative authority concerned to show that it can offer such guarantees of neutrality and impartiality as to reflect the independence of the judge.[35]

b) Limitation periods : It has repeatedly been affirmed that the setting of reasonable limitation periods for the institution of judicial proceedings is generally acceptable, to the extent that it serves the fundamental principle of legal certainty and protects the interests of both individuals and the public administration.[36] The fact that their expiry entails necessarily the total or partial dismissal of any action brought on their basis does not constitute a violation of the effectiveness principle.[37] It suffices that the applicant has been given adequate opportunities to pursue his claim. The fact that he has failed to do so within the reasonable period specifically prescribed for this purpose does not mean that national law has rendered impossible or excessively difficult the exercise of his infringed legal rights.[38] This is the case, even when the limitation period concerns a provision that has been interpreted in the context of a preliminary ruling without the imposition of any restriction on the temporal effects of the judgment that has been delivered in this direction.[39]

The above hold equally true also with regard to liability actions for breaches committed by the domestic authorities. Many governments expressed their concern about the severe financial consequences that the uncontrolled number of damages claims might entail for the national treasury. They were thus reminded that domestic law is always allowed to impose procedural restrictions in the interests of legal certainty, provided that the principles of equivalence and effectiveness are

[35] Consider Case C-236/92, *Comitato di Coordinamento per la Difesa della Cava v. Regione Lombardia* [1994] ECR I-483. The case gave rise to the question of whether it is acceptable to appoint expert witnesses who actually constitute employees of the prosecuted administrative authority. The Court did not deal with the issue, but its Advocate General commented that it is impossible to reconcile the principle of effective judicial protection with the lack of any guarantee of neutrality on the part of the expert and suggested that all experts appointed by the national court should reflect the independence of the judge. Any national arrangement that failed to provide such guarantees should be thus set aside as infringing the standards of effectiveness.

[36] *Rewe I* : *op cit.* No 31, par. 5, Case 45/76, *Comet BV v. Produktschap voor Siergewassen* [1976] ECR 2043, par. 17-18, Case C-261/95, *Palmisani v. INPS* [1997] ECR I-4025, par. 28.

[37] Case C-188/95, *Fantask A/S v. Industriministeriet* [1997] ECR I-6783, par. 48, Case C-78/98, *Preston and others v. Wolverhampton Healthcare NHS Trust and Midland Bank plc* [2000] ECR I-3201, par. 34.

[38] Case C-88/99, *Roquette Frères v. Direction des Services Fiscaux du Pas-de-Calais*, judgment of 28 November 2000, par. 25.

[39] *EDIS* : *op cit.* No 24, par. 13 *et seq.*, *Roquette Frères* : *ibid.*, par. 36.

respected.[40] There is little doubt that this reference has been made by having regard particularly to national rules on limitation periods. That this is indeed the case is further shown by the relevant case law on the retroactive application of belatedly adopted national implementing measures. It will be recalled that Italy purported to make good the damages suffered by individuals due to its failure to transpose in time the legislation on the protection of employees in the event of the insolvency of their employer[41] by giving retroactive effect to the respective implementing measures. It required that all reparation actions should be brought within one year from the adoption of that national legislation.[42] When the legitimacy of this provision was finally examined in the context of the preliminary reference procedure, the case law on limitation periods was reaffirmed and it was concluded that the contested legal norm met indeed the effectiveness requirements.[43]

A very important question arising in this respect is whether the principle of effectiveness can ever impose the obligation to extend national limitation periods, that would normally be considered as reasonable and unobjectionable.[44] At some point, it looked as if this could indeed be the case with regard to rights enshrined in provisions that do not take legal effect until after they have been transposed at national level. It was declared that, until such time as the domestic authorities had proceeded to the correct adoption of the required legislation, the limitation periods laid down by national law could not be relied upon by them in order to deny individual rights claimed on the basis of a given unimplemented measure. Their failure to comply with their respective duty created a state of legal uncertainty, that was only lifted after proper transposition in national law had finally taken place. The defaulting public authorities should not thus be allowed until then to profit from the delay of the applicant to bring judicial proceedings, so as to escape the obligations that the law intended to impose upon them.[45] There are two basic issues that need

[40] *Brasserie/Factortame III* : *op cit.* No 1, par. 98-99.
[41] Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer (OJ 1980, L283/23).
[42] Article 2 (7) of Legislative Decree No 80 (GURI No 36 of 13 February 1992).
[43] *Palmisani* : *op cit.* No 36, par. 28-29.
[44] For a complete appraisal of the case law in this area, see especially Flynn : 'Whatever Happened to Emmott ? The Perfecting of Community Rules on National Time-Limits', in Kilpatrick/Novitz/Skidmore (eds.) : *The Future of Remedies in Europe*, Hart Publishing 2000, pp. 50-67.
[45] Case C-208/90, *Emmott v. Minister for Social Welfare* [1991] ECR I-4269, par. 21-23.

clarification with regard to this *Emmott* principle. The first concerns the extent to which it is indeed required by the principle of effectiveness that the national limitation periods do not begin to run in actions against the public authorities, until the defendant has finally put an end to the violation that constitutes the basis of the relevant judicial proceedings. The second has to do with whether the temporary suspension of the national time-limits is possible, even when the case does not involve the lacking or defective transposition of a given measure in the domestic legal order. The answer to the above will determine the time from which limitation periods can be relied upon in public liability actions.

It is generally possible to distinguish between two basic types of limitation periods, those setting the deadline until which proceedings should be brought and those limiting the period to which a claim may relate back. The effect of the *Emmott* ruling was confined initially only to the former category of rules.[46] This distinction was based on the argument that the two types of limitation periods differ as to their function and effects, in the sense that the former constitute an absolute bar to bringing proceedings after their expiry while the latter merely limit the extent of the claim of the applicant.[47] Reference was further made to the interests of administrative and budgetary efficiency, that are served by the limitation periods restricting the retroactive effect of the legal claims of individuals.[48] In practice, it is not always true that such a distinction is indeed possible. Consider the example of an overpaid tax. For the individual wishing to claim its repayment, it does not really make a difference whether national law requires that he should bring his action within three years following the unlawful collection of the money by the domestic authorities or whether it provides that entitlement can only exist for a period up to three years preceding the introduction of the relevant judicial proceedings.[49] In either case the applicant will lose completely the right to claim repayment, if he fails to bring proceedings within three years from the moment of the unlawful collection. It is further apparent that the same need to achieve a certain degree of administrative

[46] Case C-338/91, *Steenhorst-Neerings v. Bestuur van de Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen* [1993] ECR I-5475.
[47] *Ibid.*, par. 21.
[48] *Ibid.*, par. 22-23.
[49] In this respect, see the Opinion of Advocate General Jacobs in *Fantask* : *op cit.* No 37, point 74.

efficiency and to protect the public treasury from unforeseen liabilities exists for both types of limitation rules.

It is now established that the scope of the *Emmott* principle cannot be determined on the basis of the distinction between rules setting the deadline for bringing proceedings and provisions limiting the backdating of legal claims. The extension of the prescribed limitation periods is possible even with regard to the latter category of rules.[50] However, such a suspensory effect can only arise in very exceptional situations and it has been declared that the solution adopted in *Emmott* was justified by the particular circumstances of that case.[51] This practically means that the plaintiff will be allowed to resist the application of reasonable deadlines, only when the defendant has deliberately misled him as to the extent or existence of his legal rights depriving thus him of any opportunity to bring in time the relevant judicial proceedings.[52] In such circumstances, it is not possible to accept that the strict adherence to an otherwise reasonable and unobjectionable limitation period can be justified by principles such as those of legal certainty and the proper conduct of proceedings.[53] This is one more example of the purposive and *ad hoc* approach followed by the case law with regard to the effectiveness requirements.[54]

Individuals wishing thus to bring liability actions for breaches committed by the domestic authorities will only be entitled to the extension of an otherwise reasonable limitation period, if they can show that they have been prevented from bringing their claim in time due to the deliberately misleading conduct of the defendant. It is necessary to ascertain whether such an extension is possible also with regard to violations consisting in something else than the total or partial failure to adopt national implementing legislation. Certain judicial pronouncements made in this respect seemed to accept that the *Emmott* principle is closely linked with the particular characteristics of Directives and that it does not thus cover infringements

[50] Case C-326/96, *BS Levez v. TH Jennings Ltd.* [1998] ECR I-7835.
[51] Case C-410/92, *Johnson v. Chief Adjudication Officer (Johnson II)* [1994] ECR I-5483, Case C-90/94, *Haahr Petroleum v. Åbenrå Havn* and others [1997] ECR I-4085, par. 51-52, Case C-114 & 115/95, *Texaco and Olieselskabet Danmark v. Havn and others* [1997] ECR I-4263, par. 48 and *Fantask* : *op cit.* No 37, par. 51.
[52] *EDIS* : *op cit.* No 24, par. 48, Case C-260/96, *Spac SpA v. Ministero delle Finanze* [1998] ECR I-4997, par. 31, Cases C-279 to 281/96, *Ansaldo Energia and others v. Amministrazione delle Finanze dello Stato* [1998] ECR I-5025, par. 22 and *Levez* : *op cit.* No 50, par. 27 *et seq.*
[53] *Levez* : *ibid.*, par. 33.
[54] *Supra* 4.2.1.

taking place outside the field occupied by them.[55] To accept this, would place rights derived from Directives in an unduly privileged position in comparison with other legal rights.[56] It would also disregard the fact that the need to offer effective judicial protection against deliberately misleading practices may arise with regard to any kind of legally binding measure. That this is indeed so seems to be supported by some recent case law. The extension of the prescribed limitation periods has been thus ordered with regard to an infringement of the principle of equal pay for work of equal value, without the case involving any lack or insufficiency of transposition in the national legal order.[57] This seems to imply a wish to extend the application of *Emmott* beyond claims based on the violation of the implementation duties. Its practical consequence for public liability purposes will be that the misleading conduct of the domestic authorities may lead to the temporary suspension of the limitation periods prescribed for claiming damages from the national treasury, regardless of the nature of the breach complained of by the plaintiff.

c) Standing rules : In principle, it is for national law to determine the standing and legal interest of individuals to bring proceedings under the Treaty.[58] However, this discretion exists only to the extent that it does not undermine the right to effective judicial protection and does not impose unreasonable restrictions on the exercise of rights conferred at the substantive law level.[59] The only guidance offered in this respect with regard to governmental liability actions is that the damages claim should relate to infringements of provisions intending to confer sufficiently identifiable individual rights.[60] It will be recalled that this condition performs a dual function. In the first place, it excludes the operation of the *Francovich* doctrine as concerns legal norms aiming exclusively at the protection of the general interest. It also makes it clear that the availability of a damages remedy should exist for anyone belonging in the category of those, the legal interests of which the violated provision

[55] *Haahr Petroleum* : *op cit.* No 51, par. 53, *Texaco* : *op cit.* No 51, par. 49 (in both cases the Court followed the conclusions of Advocate General Jacobs, points 145 *et seq.*).
[56] In this respect, see especially the Opinion of Advocate General Jacobs in *Fantask* : *op cit.* No 37, points 58 *et seq.*
[57] *Levez* : *op cit.* No 50.
[58] Cases C-87 to 89/90, *Verholen and others v. Sociale Verzekeringsbank Amsterdam* [1991] ECR I-3757, par. 24.
[59] *Ibid.*
[60] *Francovich* : *op cit.* No 5, par. 40, *Brasserie/Factortame III* : *op cit.* No 1, par. 51.

intended even partly to protect. As a result, the court examining the damages action should set aside any national rule restricting the standing of individuals covered by the personal scope of an infringed provision.

It now appears that the effectiveness principle may require sometimes the modification of national standing rules, so as to accommodate even claims put forward by plaintiffs that are not the intended beneficiaries of an infringed legal norm. It has thus been declared that individuals who are the direct or indirect victims of inconsistent national legislation should be allowed to claim judicial protection, even if they are not themselves covered by the personal scope of the provision that they attempt to rely upon. It suffices that they can demonstrate that the violation of the rights of those covered by the protective scope of the infringed measure has direct repercussions for their own legal position.[61] It could thus be imagined that a *Francovich* action should be made available not only to those intended to be protected by a given legal provision, but also to those suffering direct loss as a result of the infringement of the rights that this provision wished to confer upon its beneficiaries. For example, consider a violation that consists in the payment of unlawful public aid to certain national undertakings. Subject to the establishment of causation, there are two categories of victims that may be possibly identified in such a case. First, all foreign competitors that have been placed in a disadvantageous market position and have suffered some kind of monetary loss as a result of the unlawful aid. Second, all employees who have experienced personally the effects of the illegal national practice on their employers. One could especially think of workers, that have been made redundant due to the fact that their employers were driven out of the market as a direct consequence of the illegal public subsidy. It might be difficult for those persons to prove the existence of a direct causal link between the breach complained of and the loss alleged by them but there is no reason why they should not be given the opportunity to pursue their liability claim, even if they are not covered by the protective scope of Article 87 ECT.

There are two conditions that have to be met cumulatively, in order for the effectiveness principle to require the availability of a damages action for natural and

[61] *Verholen* : *op cit.* No 58, par. 25-26.

legal persons that do not constitute the intended beneficiaries of the infringed legal provision. The applicant must be claiming thus personal identifiable loss and his action must be based on the violation of the rights of persons falling within the protective scope of the legal measure, that constitutes the basis of the relevant liability proceedings. It is immediately apparent that it does not constitute a violation of the effectiveness standards for national law to deny the standing of interest groups to bring damages claims against the public authorities. Given that liability actions intend principally to reinstate a given financial loss and only indirectly to ensure the enforcement of the law, granting standing to third parties cannot be considered as a necessary prerequisite for the attainment of the objectives pursued by the *Francovich* doctrine. Such a right can thus only exist by virtue of the principle of equivalence, if it is provided for expressly by the respective domestic arrangements on public liability.

d) Evidence rules : There are two basic issues surrounding the operation of the effectiveness principle in the field under consideration. The first concerns the extent to which national law may impose restrictions on the forms of evidence available in the domestic courts for the proof of the legal claims of individuals. It has been repeated consistently in this respect that evidence rules should not be such as to make it virtually impossible or excessively difficult for the applicant to rely upon the rights that the law intended to confer upon him, even if the same restrictions apply also to litigation of a purely domestic nature.[62] The effectiveness principle objects especially to general presumption rules that operate against the plaintiff and prevent the court seized with a dispute from forming freely its judicial conviction on the basis of all the available kinds of proof.[63] This does not mean that the judges are precluded from relying upon presumptions as one of the available means for the determination of the evidence furnished to them in the context of a given litigation. So long as such a reliance is not the result of a generalised statutory obligation, it

[62] Case 199/82, *Amministrazione delle Finanze dello Stato v. San Giorgio* [1983] ECR 3595, par. 11-18, Cases 331, 376 & 378/85, *Bianco and Girard v. Directeur Général des Douanes et Droits Indirects* [1988] ECR 1099, par. 8-13, *Dilexport* : *op cit.* No 24, par. 44-54, *Dounias* : *op cit.* No 20, par. 68-72.

[63] In this respect, see the relevant pronouncements in *San Giorgio* : *ibid.*, par. 14, *Bianco and Girard* : *ibid.*, par. 12 and *Dilexport* : *ibid.*, par. 48.

cannot be interpreted as contravening the effectiveness requirements.[64] Apart from that, the imposition of restrictions on the available types of evidence is only acceptable to the extent that it is not critical for the success of the claim of the plaintiff. If the applicant can succeed only through recourse to means of proof that are not available with regard to a specific type of action, the court will be obliged to set aside the rule preventing their reliance in the case before it.[65]

The second question is whether effectiveness may require sometimes the adjustment in favour of the plaintiff of the burden of proof provided for by national law. It seems that this might indeed be the case, when the respective domestic arrangements impose excessive requirements as to what needs to be shown in order to receive effective judicial protection.[66] A very good example of how the effectiveness principle operates in this direction is given by the relevant judicial pronouncements on who actually bears the burden of proof as to the existence of a sufficiently serious breach in damages actions brought under *Francovich*.[67] It will be recalled that it is generally for the plaintiff to establish the gravity of the violation committed by the domestic authorities. Notwithstanding this, the mere infringement of the law may satisfy sometimes automatically the culpability standard required under the doctrine. It is not thus permitted to the courts to require the proof by the applicant of the sufficiently serious nature of violations consisting in the total omission to adopt the required national implementing legislation or in the failure to comply with a judgment delivered in the context of the public enforcement mechanism. The burden of proof in such circumstances is reversed in favour of the plaintiff and any national rule going beyond this requirement should be rendered inapplicable, even if it satisfies the principle of equivalence.

e) National rules and practices on the allocation of liability : It will be recalled that the defendant under *Francovich* is given a dimension, which is both horizontal

[64] See especially the Opinion of Advocate General Ruiz-Jarabo Colomer in *Dilexport* : *ibid.*, points 46 *et seq.*
[65] *Dounias* : *op cit.* No 20, par. 68-72, with regard to the prohibition of the use of witness evidence in public liability actions. In the same direction, the Opinion of Advocate General Jacobs, at points 49-50.
[66] Case C-177/88, *Dekker v. Stichting Vormingscentrum voor Jong Volwassenen (VJV) Plus* [1990] ECR I-3941, par. 23-26. The case involved a national rule, that obliged the plaintiff to show fault on the part of her employer in cases brought on the basis of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions (OJ 1976, L39/40).
[67] *Supra* 3.3.3.

and vertical. Indeed, public liability proceedings are possible for violations attributed both to the three branches of government and to bodies having sufficiently close links with the central administration to be considered its emanations.[68] The basic question arising in this respect concerns the latitude that national law is left with to determine the capacity in which a *Francovich* action can be possibly brought and to ascertain the division of liability between the central government and the specific public body responsible for a given breach. At a further stage, it is wondered whether the principle of effectiveness might affect the discretion of the defaulting domestic authority to turn eventually against its public servants and to recuperate personally from them anything it was obliged to pay under the doctrine due to the violations that they have committed in the performance of their functions.

It has already been seen that there is a clear tendency not to interfere with the domestic arrangements on the division of liability between the central government and its component parts, save to the extent that the obligation to turn exclusively against a given public entity might deprive the plaintiff from any reasonable chance of receiving compensation in the context of a specific scenario.[69] This is nothing more than a transposition in the field of damages actions of a case law already developed with regard to the recovery of unlawfully levied charges.[70] On the contrary, the horizontal allocation of responsibility between the different branches of government has not received yet an equally straightforward treatment. It is thus wondered whether the determination of the exact capacity in which a given violation has been committed makes in fact any difference in terms of the effectiveness principle and the objectives pursued by it. A possible negative answer would open automatically the way to the application of techniques that would facilitate the application of *Francovich*, without compromising the measure of protection offered to the intended beneficiaries of the infringed legal provisions.

i) The imputation of the breach to the administration : In practice, national courts are often inclined to link any damage complained of by the plaintiffs with

[68] *Supra* 2.2. and 2.3.
[69] *Supra* 2.4.2.2.
[70] *Texaco* : *op cit.* No 51, par. 38-43. In the same respect, the Opinion of Advocate General Jacobs, at points 168-173.

breaches imputed to the administration. This constitutes an apparent attempt to reconcile the traditional position of their domestic legal order on the infallibility of the legislature with their respective obligations under the *Francovich* doctrine. One way of doing so is by reproaching the government or the competent ministerial department for their failure to initiate the procedure for the adoption of national implementing legislation and their omission to reform and repeal already existing inconsistent domestic law provisions.[71] The problem that arises in this direction is that certain legal orders consider that the decision as to the need to propose the adoption and modification of the law is an issue, that concerns exclusively the relationship between the executive and the legislature.[72] It is classified accordingly as an *acte de gouvernement*, that generally escapes from any kind of judicial control.[73] It is usually thus much more convenient for the domestic judges to order damages for the application by the administrative authorities of inconsistent national legislation. It is irrelevant in this respect whether the violation consists in the imposition upon individuals of an illegal obligation or in the failure to confer upon them a right provided for by a given legal measure.

This is better known as the technique of the *réglement écran*, especially resorted to by the French administrative courts. Given that the principle of supremacy renders inapplicable any inconsistent national law provision[74], the exercise of administrative activity is deprived of any legal basis when it relies on a legal authorisation provided for by a legislative measure adopted in contravention of such a superior legal standard. Acting thus in the absence of valid authorisation, the administration should be ordered to make good any loss arising from its illegal conduct. The best example of how this technique is applied in practice is given by a case concerning the misimplementation of the legislation on the taxation of

[71] For example, see the decision of the Spanish Minister for Employment and Social Security with regard to a public liability claim brought on the basis of the failure to implement in time Directive 80/987. The minister concluded that this breach, although legislative in nature, was due to the failure of the relevant ministerial department to bring forward in time the necessary law project for the transposition of the measure in the national legal order. The action had thus to be directed against the minister responsible for this failure. For more in this respect, see Bribosia : *op cit.* No 32, pp. 226-227.

[72] This is basically the case in France. The influence on this point of the French legal theory is also evident in the Greek legal order.

[73] The French *Conseil d'Etat* has thus rejected the possibility of bringing a damages action against the administration for its failure to propose the adoption of a law in the following words : "la question ainsi soulevée, qui se rattache aux rapports du pouvoir exécutif avec le parlement, n'est pas susceptible de par sa nature d'être portée devant la juridiction administrative" (decision of 29 November 1968, *Sieur Tallagrand* [1968] *Rec. Lebon* 606).

[74] Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] ECR 629, par. 21.

manufactured tobacco.[75] The *Conseil d'Etat* concluded that the loss sustained by the plaintiffs was not attributed to the failure of the legislature to transpose correctly the measure in the national legal order, but rather to the illegal conduct of the administration.[76] National law had given the government the power to fix the prices of tobacco products, leaving it much discretion in this respect. On the basis of this authorisation, the government adopted a normative measure that was made applicable to tobacco producers. Since the authorising legislation contravened the provisions of a superior legal standard, the principle of primacy required it to be set aside. The administration was thus to be blamed for the adoption of a normative act on the basis of an inexistent authorisation and any loss suffered by the plaintiffs was actually due to the application against them of the illegal provisions of that act.[77] It is interesting that the judgment does not seem to restrict the operation of this technique only to directly effective provisions, as it would have been expected on the basis of the wording of the *Simmenthal* principle.[78] It rather extends its application with regard to any legally binding norm.

ii) Assessing the legality under Francovich of techniques imputing the breach to the administration : It has been argued that such a transfer of responsibility to the shoulders of the administration amounts to a recognition that the legislature has a *carte blanche* to violate its respective obligations, since it will never be penalised for it.[79] This is not entirely accurate. It appears that problems will only arise, if the implication behind the reasoning followed in this respect by the courts is that the payment of damages is excluded whenever it is impossible to link the breach with

[75] Council Directive 72/464 of 19 December 1972 on taxes other than turnover taxes which affect the consumption of manufactured tobacco (OJ 1972, L303/1).

[76] *Société Rothmans International France and Société Arizona Tobacco Products* (1992) 48 *AJDA* 210 (for a comment on these cases, see Fines : (1992) 108 *RDpubl* 1480).

[77] In the same line of reasoning, see the unreported decision of the Brussels Court of First Instance of 9 February 1990 in *Michel and others v. Office National des Pensions et l'Etat Belge.* It was declared there that it is the executive that actually represents the State in public liability actions, even if it is the legislature that is obliged to adopt the necessary measures required to ensure compliance with Community law. It is reported that the same technique is also used in Italy (Merola/Beretta : 'Le droit Italien', in Vandersanden/Dony (eds.) : *op cit.* No 32, pp. 289-349, at p.290). Also see the conclusions of *Commissaire du Gouvernement* Goulard in *Ministre du Budget v. SA Jacques Dangeville* (1997) 13 *RFDA* 1056. He argued in favour of the application of the solution adopted by the *Rothmans/Arizona Tobacco* cases, even when the loss arises directly from the application of an individual act without the interposition of a normative administrative measure.

[78] *Simmenthal* : *op cit.* No 74. In par. 17 of the judgment, reference was made to a conflict between directly effective provisions and inconsistent national legislation.

[79] Dantonel-Cor : 'La violation de la norme communautaire et la responsabilité extracontractuelle de l'Etat', (1998) 34 *RTDE* 75, at p. 89.

the activity of the administrative authorities. This could especially be the case with regard to damages resulting directly from a legislative provision, without the interposition of any normative or individual act of application. It does not otherwise seem to make much difference for the effectiveness principle whether the breach will be imputed to the one or the other branch of government. This is because the compensation due is paid out of the national treasury, regardless of the origin of the loss sustained by the applicant.

This is even more so for the reason that it has now been established that the criterion for the determination of the gravity of the breach under *Francovich* is not exclusively the discretion enjoyed by the defaulting national authority[80], but also the degree of precision of the provision infringed and the clarity of the law in the field where the violation has occurred.[81] The establishment of a sufficiently serious breach is dissociated thus from the discretion factor, the degree of which may vary depending on the nature of the national authority disposing it. It is rather linked with the much more objective clarity and precision criterion. As a result, it is no longer decisive for the receipt of compensation which arm of government the liability action will be brought against. Any examination will be based on objective criteria and not on the different degree of discretion, that the various branches of government may enjoy in a given legal area.

One possible exception to the above is with regard to breaches consisting in the total failure to adopt national implementing legislation. Indeed, any omission to proceed to the timely transposition of the law in the domestic legal order constitutes automatically a sufficiently serious violation.[82] If the loss of the applicant is thus treated as emanating not from the inaction of the national legislature but rather from the failure of the domestic authorities to give practical effect to the provisions of the unimplemented measure, this has immediate repercussions for the burden of proof in the respective liability action. In such circumstances, the gravity of the breach will not be established automatically. It will be rather ascertained on the basis of the

[80] This was conclusion from the combined reading of *Brasserie/Factortame III* : *op cit.* No 1, par. 55 and Case C-5/94, *R v. Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas* [1996] ECR I-2553, par. 28. Also *supra* 3.3.3.1.
[81] *Haim* : *op cit.* No 5, especially par. 41-43. The judgment follows in this respect the conclusions of Advocate General Mischo (especially points 75-79). Also see *supra* 3.3.3.1(c).
[82] Cases C-178, 179 and 188 to 190/94, *Dillenkofer and Others v. Germany* [1996] ECR I-4845, par. 29.

clarity of the law in the area, where the domestic authorities were called upon to perform their public functions. The imposition of a more stringent standard of liability to take into account the interposition of the administration between the inaction of the national legislature and its effects on the applicants is not objectionable of itself. It is nevertheless obvious that in any failure to implement there exists a violation on the part of the national legislature of its clear obligation to proceed to the timely transposition of the law in the domestic legal order. The intervention of the administration does not change this fact. The question is thus whether the classification of such breaches as administrative does not in fact undermine the effort made through the introduction of the *per se* sufficiently serious breach rule to make the legislature more responsible in its implementation duties.

Notwithstanding this fact, the imputation to the administration of a breach that can be also attributed to the legislature seems to be in perfect harmony with the duties that the *Costanzo* principle imposes upon the national authorities, at least with regard to directly effective provisions.[83] That this is indeed so is further testified by *Brinkmann*.[84] The way that this case has been decided comes very close to accepting the reasoning used by the national courts in the application of the *réglement écran* technique. It is interesting that the violation involved in *Brinkmann* consisted specifically in the failure of the administration to give immediate effect to the provisions of an unimplemented measure. The special concerns that arise with regard to breaches consisting in the failure to proceed to the timely adoption of national implementing legislation may be possibly eased by making a more extensive recourse in this area to the public enforcement mechanism and the legislative means prescribed for ensuring the respect of the decisions delivered in its context. After all, the imposition of public liability cannot always constitute the panacea for the absence of a legislative system capable of ensuring the enforcement of the duties imposed on the domestic authorities.

The problems that the imputation of illegality to the legislature entails for certain national legal orders may also be overcome through the imposition of

[83] Case 103/88, *Fratelli Costanzo SpA v. Commune di Milano* [1989] ECR 1839, par. 30. Also see *supra* 2.4.1.
[84] Case C-319/96, *Brinkmann Tabakfabriken GmbH v. Skatteministeriet* [1998] ECR I-5255. For more details, see *supra* 2.4.1.

liability, without the specification of the organ that is principally responsible for the loss of the plaintiff. This strategy has been already employed by some lower administrative courts. Resort to it may sometimes constitute the only workable means, when the defendant has contributed in various ways in the perpetration of a given violation without being possible to identify the exact capacity in which it should be sued under *Francovich*. In other cases, it may be used as a simple expedient to facilitate the indirect imposition of public liability for breaches attributed to the legislature and the judiciary. There seems to be no objection in principle against its application, to the extent that it may facilitate the payment of damages to the suffering individuals without compromising the objectives pursued by the doctrine of governmental liability.[85]

iii) The right to bring a recoupment action against the public servant responsible for the breach : That brings us to the final question of whether the principle of effectiveness affects the discretion that the defendant in a *Francovich* suit may enjoy under national law to bring recoupment actions against its public servants, in order to claim personally from them everything that it has been obliged to pay to the suffering individuals. Once again, this is an issue that has not been tackled yet directly by the case law. It could be nevertheless expected that the internal allocation of liability between the central administration and its servants will only exceptionally involve elements, that might attract and justify some degree of judicial intervention.[86] Since the problem arises after individuals have received compensation for the illegal activity of the public authorities, it will be difficult to establish that the respective domestic arrangements may violate the requirements of

[85] See especially the decision of the Paris Administrative Court of Appeal in *Société Jacques Dangeville* (1992) 48 *AJDA* 768 (comment by Pretot). The case concerned the failure of France to transpose the 6th VAT Directive into national law. The court came to the conclusion that the defendant had violated its duty to take all the necessary measures to ensure the fulfilment of its implementation duties. It then went on to order the payment of damages for the illicit situation created, without specifying whether the breach was attributed to the legislature (that failed to implement the Directive), the government (that failed to bring forward a law project for the transposition of the Directive) or the administration (that refused to apply the Directive and went on to collect the taxes in contravention of its provisions). The position of the *Conseil d'Etat* on this technique is not known. When the case was brought before it on appeal, it held that the Paris Administrative Court had erred in law by holding the action for damages admissible. It thus found against the plaintiff, without commenting on the substance of the litigation. It is nevertheless interesting that the Paris Administrative Court of Appeal applied the same reasoning also in the case of *Société John Walker* [1992] *Rec. Lebon* 790. The claim of the plaintiffs was rejected on the basis of their failure to establish causation.

[86] In this respect, the Opinion of Advocate General Mischo in *Haim* : *op cit.* No 5, point 37. He argued that the internal allocation of liability between the public administration and its civil servants is a matter relating exclusively to national law, that escapes from any kind of judicial control upon it.

effective judicial protection. Any objections can thus only concern the other aspect of the effectiveness principle, namely the one referring to the attainment of the general objectives pursued by the law. To give an example, it could be argued that it might weaken the deterrent effect of the *Francovich* doctrine to allow a recoupment action in circumstances where the public servant has committed the breach in the performance of binding statutory duties. This would permit the eventual transfer of liability away from the principal wrongdoer. It is nevertheless very uncertain whether the need to promote such objectives might suffice of itself to justify the extensive judicial intervention in a field, that continues to remain primarily within the discretion of the national legislature.

4.2.3.2. Remedial law issues : The principle of national procedural autonomy also covers the remedial aspects of public liability actions. The discretion left in this respect to national law is curtailed by the effectiveness requirements on the measure of the compensation that the plaintiff should be entitled to. It is thus necessary to ascertain the criteria that the courts have to apply for the quantification of the loss of the applicant and to determine the extent to which the domestic legal orders may impose limitations on the amount of damages that individuals should receive in the context of any given scenario. Before proceeding to the examination of issues regarding the actual measure of the compensation due, it is first necessary to determine whether it has been indeed intended to link the system of public liability introduced by *Francovich* exclusively with the availability of a damages remedy against the domestic authorities. The question is whether the doctrine is merely giving to individuals a right to reparation, in whatever form national law may decide to provide it.

a) The type of the remedial protection offered by Francovich : It is now apparent that the national legal orders are left with some latitude to decide the best possible way to make good the loss sustained by individuals, due to the violation by the domestic authorities of the obligations that the law imposes upon them. Suffice it to recall at this point the relevant case law on the retroactive application of belated

national implementing legislation.[87] The conclusion from the pronouncements in that area is that the payment of damages is merely one of the possible alternative means that the domestic legal orders may employ, in order to comply with their duties under the *Francovich* doctrine. The freedom of action left to them in this direction is considered as a necessary adjunct of the discretion that they enjoy to make reparation for the illegal activity of the public authorities on the basis of the respective provisions of national law. This has been interpreted as meaning that the availability of damages as a form of relief is guaranteed, only when this is required by the twin principles of effectiveness and effective judicial protection.[88] National law is not thus precluded from repairing any loss arising from the erroneous exercise of public power through alternative forms of redress, making the payment of damages available only to the extent that this is necessary to supplement the protection offered to individuals.[89]

This confirms the position that *Francovich* was introduced, in order to offer a cause of action against the various immunities traditionally linked with the performance of public functions. It does not intend to prescribe the payment of damages as the only form of relief that should be made available to those seeking reparation for loss sustained due to the illegal activity of the domestic authorities.[90] It merely wishes to guarantee that individuals will be reinstated in the financial position they would have been in, had the violation complained of not taken place. Provided that this is achieved, it does not contravene the effectiveness principle for the defendant in the liability action to offer redress by whatever means it considers most suitable under the respective arrangements of its domestic legal order. The doctrine does not offer thus a specific remedy in damages but rather a right to receive reparation of some form, supplemented by an additional action for the imposition upon the wrongdoer of the obligation to make good any further loss not covered by the available legal avenues.

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[87] *Supra* 1.5.
[88] *Supra* 1.4.
[89] Cases C-94 & 95/95, *Bonifaci & Berto v. INPS* [1997] ECR I-3969, par. 45 *et seq.* and Case C-373/95, *Maso & Gazzetta v. INPS* [1997] ECR I-4051, par. 33 *et seq.*
[90] Dougan : 'The Francovich Right to Reparation : Reshaping the Contours of Community Remedial Competence', (2000) 6 *EPL* 103, especially pp. 108-113.

It is nevertheless to be doubted whether the procedural autonomy left in the remedial field may reach up to the point to allow the transfer of the duty to provide relief for a given violation from the shoulders of the recalcitrant country to those of bodies with a purely private status. This would change the nature of the remedy offered to individuals from one targeting the abuse of public power to one penalising entities totally irresponsible for the illegal activities of the domestic authorities. This would not necessarily affect the measure of the judicial protection offered to the plaintiff, but could undermine the dissuasive function of the doctrine of governmental liability by lifting the financial repercussions that the latter entails for the national treasury. It could be thus argued that national law is allowed to accompany the liability of the domestic authorities with the provision of relief in a form other than damages, only when the reparation of the loss suffered by the applicant retains its public nature. It is only then that this arrangement is legitimised under the principle of national procedural autonomy.

b) The determination of the extent of the reparation due : In the absence of judicial harmonisation, it is for the domestic legal orders to provide the criteria for the quantification of the loss of the plaintiff and the determination of the measure of compensation that he will be eventually entitled to.[91] It is also for national law to decide the specific heads of damage for which reparation may be awarded.[92] This discretion is made subject to the respect of the familiar principles of equivalence and effectiveness.[93] National rules may violate the effectiveness requirements by imposing excessive restrictions on the period covered by the reparation due and on the amount and type of damages that may be ordered against the defendant. The case law has provided guidance in respect of both these issues, offering clarification as to what the effectiveness standards require in the field under consideration.

i) The reference period for the calculation of the right to reparation : Drawing thus inspiration from the judicial pronouncements made in the context of actions for

[91] *Brasserie/Factortame III* : *op cit.* No 1, par. 83.
[92] *Ibid.*, par. 88.
[93] *Ibid.*, par. 83 and 88.

the recovery of unlawfully collected sums, it is apparent that national law may not confine the right to receive compensation from the public funds only to plaintiffs bringing proceedings before the delivery of a judgment establishing the illegality of a given national practice.[94] The opposite would nullify the judicial protection that individuals failing to meet the above condition might be entitled to.[95] It is only the Court itself that may decide, in the context of rulings given under the preliminary reference procedure, that imperative reasons of legal certainty make it necessary to restrict the temporal effects of its judgments.[96] Apart from this, the only temporal restrictions that can be imposed on the right of individuals to claim damages from the public funds are the ones deriving from the application of reasonable national limitation periods.

Again with the exception of the domestic rules on limitation periods, the principle of effectiveness also objects to statutory provisions restricting the discretion of the courts to determine on the facts of each case the starting point of the period for which the payment of damages may be sought. The issue has so far arisen with regard to the right to order compensation for loss sustained before the judicial establishment of a given violation in the context of the public enforcement mechanism. It has thus been declared that the right of individuals to receive damages from the national treasury may not be ascertained by reference exclusively to the period following the delivery of a judgment under an enforcement action, establishing the perpetration by the domestic authorities of the violation that constitutes the basis of the loss sustained by the applicant.[97]

There are two reasons why such a requirement would call into question the right to reparation conferred by the case law. The first has to do with the fact that it is not the totality of the breaches committed by the public authorities that constitute the subject of an enforcement action. Indeed, the Commission enjoys a wide discretion as to the initiation of the respective proceedings and individuals are virtually excluded from all judicial and administrative stages of this public enforcement mechanism. Equally importantly, the existence of a judgment under

[94] Case 309/85, *Barra v. Belgium and another* [1988] ECR 355.
[95] *Ibid.*, par. 19.
[96] *Ibid.*, par. 13.
[97] *Brasserie/Factortame III* : *op cit.* No 1, par. 91 *et seq.* Also the Opinion of Advocate General Tesauro, at points 112 *et seq.*

this procedure is not always a necessary prerequisite for the imposition of *Francovich* liability.[98] Indeed, the right to reparation begins to run from the very moment that the relevant substantive conditions are satisfied. This has in practice the meaning that, subject to the establishment of causation, the amount of the compensation due should be calculated by taking as the starting point of the relevant reference period the precise moment that the wrongdoer began to commit a manifest and grave disregard of its respective legal duties. This point may indeed coincide sometimes with the delivery of a judgment following the institution of enforcement proceedings. However, it may also very well precede the latter. This will be the case, when the violation has taken place in a field characterised by the clarity and precision of the obligations that the domestic authorities have failed to comply with. It is for the national courts to make the relevant determination. The freedom of action that they enjoy in this respect should not be fettered by rules, that render the payment of compensation conditional upon the delivery of a decision under the public enforcement mechanism. It is immediately apparent that the reasoning employed in this respect has a much more general application. It also covers any situation where the national law imposes *a priori* restrictions as to the moment from which the obligation to make reparation actually begins to run.

ii) The quantification of the loss of the applicant and the heads of damage covered by the reparation : The reparation offered to individuals in public liability actions brought under *Francovich* should be commensurate with the loss or damage sustained, so as to ensure the effective protection of their rights.[99] This seems to have the meaning that the situation which would have obtained in the absence of the infringement alleged by the applicant should be restored, at least in terms of its financial content.[100] The case law is following on this point the relevant judicial pronouncements made in the field of damages actions brought against the political institutions.[101] It also confirms the earlier statements made with regard to violations of the principle of sex equality in the employment area. It has thus been declared

[98] *Ibid.*, par. 93.
[99] *Ibid*, par. 82.
[100] Opinion of Advocate General Tesauro in *Brasserie/Factortame III* : *ibid.*, point 111.
[101] For example, see Cases C-104/89 & 37/90, *Mulder and others v. Council and Commission* [1992] ECR I-3061, par. 34.

consistently in this respect that, where national law chooses to penalise employers that infringe the prohibition of sex discrimination by imposing upon them the obligation to pay damages to their victims, that compensation must in any event be adequate in relation to the loss sustained.[102] This has been interpreted as requiring the provision of full monetary relief to the applicant[103], when it is shown that the latter would have been actually hired in the absence of the sex discrimination complained of by him.[104]

The recoverable heads of damage : It is thus incontestable that the principle of effectiveness prohibits the imposition by national law of any general statutory ceiling on the amount of the reparation due.[105] As for the heads of damage covered by the compensation, they should include both capital and consequential loss. More specifically, the financial relief offered must be such as to cover both the reduction in the assets of the plaintiff (*damnum emergens*) and any loss of profit (*lucrum cessans*) causally due to the violation committed by the domestic authorities.[106] National law should also provide for the payment of interest, as a means of reinstating a belatedly conferred benefit to its original financial value.[107] This is once more the confirmation of a case law originally developed with regard to infringements of the prohibition of sex discrimination.[108] It is for each national legal order to determine the rate of that interest, provided that the respective arrangements comply with the effectiveness principle and do not discriminate against with regard to similar domestic law claims.

It is now apparent that a damages action is possible, even when the loss of the applicant consists entirely in a cash flow disadvantage occasioned by the effluxion of time and does not contain any further capital component.[109] A very

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[102] Case 14/83, *Von Colson and Kamann v. Land Nordrhein-Westfalen* [1984] ECR 1891, par. 23.
[103] Case C-271/91, *Marshall v. Southampton and South West Hampshire Area Health Authority* [1993] ECR I-4367, par. 34.
[104] Case C-180/95, *Draempaehl v. Urania Immobilienservice* [1997] ECR I-2195. When the applicant would not have been hired even in the absence of the discrimination, the restriction of the compensation due to a couple of months of lost earnings is not objectionable. For more details, see Ward : 'New Frontiers in Private Enforcement of EC Directives', (1998) 23 *ELRev* 65, pp. 65-72.
[105] *Marshall II* : *op cit.* No 103, par. 34.
[106] *Brasserie/Factortame III* : *op cit.* No 1, par. 87.
[107] Case C-66/95, *The Queen v. Secretary of State for Social Security ex parte Eunice Sutton* [1997] ECR I-2163, par. 30-34. Also see *Bonifaci & Berto* : *op cit.* No 89, par. 53 and *Maso & Gazzetta* : *op cit.* No 89, par. 41.
[108] *Marshal II* : *op cit.* No 103, par. 31.
[109] *Sutton* : *op cit.* No 107 and Cases C-397 & 410/98, *Metallgesellschaft and others v. Commissioners of Inland Revenue and HM Attorney General* [2001] ECR I-1727, par. 90 *et seq.* Also the Opinion of Advocate General Fennelly, at point 53.

good example is given by *Metallgesellschaft.*[110] The plaintiffs had been obliged to pay advance corporation tax in circumstances where they could have avoided doing so, if their parent company had its seat in the host country. This constituted a breach of the provisions on freedom of establishment.[111] Had it not been for this violation, they would have been able to pay the tax at a later time. They claimed thus interest, corresponding to the period between the premature collection of the tax and the date that the money should have been normally paid. The fact that their claim was exclusively for the payment of interest did not affect their chances of obtaining redress. It was indeed decided that they were entitled to an effective remedy, either in damages or in restitution.[112]

It also appears that governmental liability can arise, even when the loss has been passed on to the market. This is especially apparent from *Comateb.*[113] The applicants had been obliged to pay dock dues in contravention of the prohibition on the imposition of custom duties and charges having equivalent effect. The defendant submitted that they had managed to pass their capital loss on to the market and it was then held that they did not have the right to seek restitution, to the extent that this would amount to their unjust enrichment.[114] Notwithstanding this fact, it was recognised that they were entitled to bring a *Francovich* action in order to get reparation for loss caused by the levying of charges not due. It was further clarified that damages could be sought, irrespective of whether those charges had been already passed on.[115] What seems to be acknowledged in this case is the fact that the mere passing on of the loss to the market does not exclude that the affected traders may have suffered further consequential damage, due to the increase of the price of their products and the weakening of their competitiveness. This is an interesting development, given that the case law seems to have introduced the opposite solution with regard to liability actions brought against the defaulting political institutions.[116]

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[110] *Metallgesellschaft* : *ibid.*
[111] *Ibid.*, par. 35-76.
[112] *Ibid.*, par. 77-96.
[113] Cases C-192 to 218/95, *Société Comateb and others v. Directeur Général des Douanes et Droits Indirects* [1997] ECR I-165.
[114] *Ibid.*, par. 21 *et seq.*
[115] *Ibid.*, par. 34.
[116] Case 238/78, *Ireks-Arkady v. Council and Commission* [1979] ECR 2995, par. 14. Also see Case 256/81, *Pauls Agriculture v. Council and Commission* [1983] ECR 1707, par. 8-10 and Cases 256, 257, 265 to 267/80, 51/81 & 282/82, *Birra Wührer v. Council and Commission* [1984] ECR 3693, par. 26-30.

The determination of all other heads of damage is left entirely to national law, subject to the respect of the equivalence principle. For example, this is the case with regard to exemplary damages. Their principal aim is not the financial reinstatement of the applicant, but rather the punishment of the defendant for the oppressive and unconstitutional activity of its public authorities. As such, their availability is not considered as an integral part of the right to reparation that individuals are granted under the *Francovich* doctrine. They are thus guaranteed, only to the extent that they are also provided for in respect of claims brought on purely domestic law grounds.[117] The practical effect of their exclusion from the scope of the effectiveness principle is that individuals are deprived of any incentive to bring liability actions against the public authorities, when the loss suffered is not such as to justify the time and expenses involved in the respective judicial proceedings. It also means that the availability of a damages action will produce little dissuasive effect, when the monetary sums involved are minimal. The defaulting public authority is not really deterred in such circumstances from continuing its unlawful activity, in the knowledge that the financial penalty that will be eventually imposed on the national treasury will not be very significant. The approach followed on the availability of exemplary damages provides evidence that *Francovich* is viewed as a remedy with a primarily compensatory objective, that may prove a very unsuitable tool for ensuring the respect of the law by the domestic authorities in fields where small financial claims are usually involved.

The quantification criteria for the payment of Francovich damages : With regard to the actual quantification of the sustained loss, it is apparent that the measure of the compensation due will depend on the economic reality of each country. Similar breaches may thus give rise to the payment of diverse amounts of damages, in order to take account of the different social and economic conditions of the various national jurisdictions. Indeed, what constitutes reparation commensurate with the loss and damage sustained needs to be ascertained by reference to a national standard. It is further clear that what the applicant will eventually be entitled to can

[117] *Brasserie/Factortame III* : *op cit.* No 1, par. 89.

be restricted by the national rules on limitation periods[118], the operation of the mitigation principle[119] and the objection of parallel proceedings.[120] The failure of the plaintiff to bring his liability action within a reasonable period and to avail himself of any legal means that might have reduced the scale of his loss and offered to him a more substantive form of relief establishes an absence of diligence. This being so, it is not possible to sustain that the reduction of the actual measure of the reparation that he would have otherwise been awarded constitutes in such circumstances an infringement of the principle of effective judicial protection.

In some cases, the task of the national courts is facilitated by the fact that the loss suffered by the plaintiff can be determined sufficiently by simple reference to the provisions of the infringed legal norm. This is especially the case, when the infringement consists in the failure to confer upon individuals a certain financial benefit. In such circumstances, the capital component of the reparation due corresponds to the monetary sum that the plaintiff has been deprived of as a result of the violation by the domestic authorities of their respective legal obligations.[121] An interesting situation arises, when the infringed provisions leave some latitude for the determination of the extent of the benefit that should be made available to their addressees. They can do so particularly by providing for alternative reference periods for the calculation of the financial advantage that they prescribe[122] and by allowing the imposition of maximum ceilings and other restrictions on the monetary amount that their beneficiaries will be entitled to.[123] When this is the case, the compensation that the plaintiff will be awarded should reflect at least the minimum financial content of the benefit that the law intended to confer upon him.[124] This minimum will be determined by looking at the least favourable for individuals options provided for by the measure concerned.

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[118] *Supra* 4.2.3.1(b).
[119] *Brasserie/Factortame III* : *op cit.* No 1, 84-85. Also *supra* 1.4.1.
[120] *Ibid.* Also *supra* 1.4.2.
[121] This was the situation in *Francovich* : *op cit.* No 5. The capital loss of the applicants consisted in the amount of the guarantee that they were deprived of due to the failure of Italy to implement in time Directive 80/987 (*op cit.* No 41).
[122] Article 4(2) of Directive 80/987 offered the option to limit the liability of the guarantee institutions, by establishing that payment of outstanding claims is ensured only for a period chosen according to the alternatives of Article 3(2) of the Directive.
[123] Article 4(3) of Directive 80/987 provided thus the possibility to set a ceiling to the guarantee that could be paid to those covered by its protective scope, in order to avoid the payment of sums going beyond its social objectives. Article 10 of the same Directive further allowed to take all the necessary measures, in order to avoid abuses.
[124] Especially in this respect, the Opinion of Advocate General Cosmas in *Bonifaci & Berto* : *op cit.* No 89, at point 104.

However, the extent to which individuals may claim capital loss exceeding in amount that minimum guarantee is still contested. The answer seems to be in the negative, when the defaulting country decides to remedy the financial consequences of the illegal activity of its public authorities by giving retroactive effect to the national legislation by which it terminates the violation of its respective legal obligations. National law is not precluded then from restricting the extent of the reparation due, by making use of whatever discretion it enjoys under the belatedly applied legal norm to limit the extent of the actual financial advantage that the latter purported to confer upon its intended beneficiaries. However, this restriction must take place in accordance with the rules and conditions laid down in the provisions of the authorising measure and must not amount to a violation of the principle of effective judicial protection. Provided that this is so, any further claim brought in the courts can only be for the recovery of additional loss connected with the effluxion of time and may not concern the capital component of the compensation due.

A very good example in this respect is given by the decisions in *Bonifaci*[125] and *Maso*.[126] It will be recalled that these cases concerned the validity of national law giving retroactive effect to the measures that implemented belatedly in the domestic legal order the provisions of Directive 80/987.[127] It was concluded that the domestic legislation could make use of the discretion that it was left with under this measure to limit the liability of the guarantee institutions with regard to the monetary sums that individuals would be entitled to receive from them.[128] It was nevertheless added that the adopted legislative decree suffered from a double point of view. In the first place, it calculated incorrectly the period of employment for the outstanding wage claims of which the guarantee institutions were responsible.[129] It further prohibited the aggregation of the amounts provided for by the Directive with allowances under national law, despite the fact that their payment did not go beyond the social objectives of the belatedly transposed measure and did not constitute an abuse so as to be prohibited under its provisions.[130] To the extent however that the

[125] *Bonifaci & Berto* : *ibid.*
[126] Maso & Gazzetta : *op cit.* No 89.
[127] Council Directive 80/987/EEC : *op cit.* No 41.
[128] *Bonifaci & Berto* : *op cit.* No 89, par. 45 *et seq.*, Maso & Gazzetta : *op cit.* No 89, par. 33 *et seq.*
[129] *Bonifaci & Berto* : *ibid.*, par. 30 *et seq.*, *Maso & Gazzetta* : *ibid.*, par. 43 *et seq.*
[130] *Maso & Gazzetta* : *ibid.*, par. 55 *et seq.*

domestic legislation reinstated completely and retroactively the content of the right that the intended beneficiaries of the unimplemented measure were supposed to enjoy, any claims on the basis of *Francovich* could be brought only for the recovery of extra damages that were not made good by the adopted legislative decree.[131]

It is not nevertheless apparent whether the same also holds true, when the reparation takes the form of damages sought directly from the national treasury. It could be possibly argued that individuals cannot complain that they are not fully compensated, when what they receive as the capital component of their loss under a public liability action is not less than what they could have been restricted to in case that the defendant had exercised the latitude left to it under the violated norm to limit the amount of the benefit that they have been deprived of. However, the matter continues to remain open to controversy in the absence of any judicial resolution.

4.3. The prohibition of discrimination against damages actions brought under Francovich : Notwithstanding what has already been said, the conditions under which individuals will receive compensation for the breach by the domestic authorities of their respective legal obligations must not be less favourable than those governing similar actions of a domestic nature. The prohibition of discrimination against *Francovich* holds equally good for conditions of both a substantive[132] and a procedural or remedial character.[133] Thus, even the harmonisation of the liability standards that has been attempted at the substantive law level can be compromised by the existence of more lenient and yet diverse rules in the various national legal orders.

The application of the equivalence principle is not devoid of practical difficulties. There are two basic issues that need to be dealt with in this respect. In the first place, the national judge is called upon to ascertain whether there exist indeed comparable domestic actions whose rules could be possibly extended to claims involving some Community law component. In the existence of multiple such domestic actions, he is further required to determine the one that comes closer

[131] *Bonifaci & Berto* : *op cit.* No 89, par. 45 *et seq.*, *Maso & Gazzetta* : *ibid.*, par. 33 *et seq.*
[132] *Brasserie/Factortame III* : *op cit.* No 1, par. 66.
[133] *Francovich* : *op cit.* No 5, par. 43.

to the characteristics of the specific claim brought by the plaintiff. Provided that a comparable national procedure does indeed exist, it becomes then necessary to decide whether the rules governing it are not more favourable than the ones prescribed for similar Community law claims. This task is again entrusted to the national courts. However, the case law has offered some useful clarification on the criteria that govern both the identification of a similar action under national law and the determination of the more favourable domestic standards. Although the relevant guidance has not always been provided for in the context of governmental liability suits, the solutions given in this direction hold equally good also in this latter area.

4.3.1. The identification of the similar domestic action : The national court should only compare rules governing actions which are similar as concerns their purpose, cause of action and essential characteristics.[134] A very good example of the application of these criteria in the field of public liability is given by *Palmisani*.[135] It will be recalled that the retroactive application in full of national implementing measures has been declared as one of the means that the domestic legal orders possess in the context of the principle of national procedural autonomy to make good the loss caused to individuals due to the failure of the public authorities to proceed to the timely transposition of Directives.[136] The question that followed this assertion was whether the claim for the retroactive payment of belatedly conferred benefits could be assimilated in procedural terms with the ordinary entitlement action for benefits arising after the adoption of the implementing legislation.

The case law has given a negative answer to it.[137] The reason for doing so is that the two actions pursue a different objective. The former is compensatory in nature and can be complemented by a governmental liability action for any loss not covered by it. The latter intends simply to give effect for the future to the requirements of a given legal measure.[138] The pursuit of different objectives is also the reason why other domestic law actions for obtaining social security benefits may

[134] *Preston* : *op cit.* No 37, par. 57. Also, *Levez* : *op cit.* No 50, par. 41 and 43 and *Palmisani* : *op cit.* No 36, par. 38.
[135] *Palmisani* : *ibid.*
[136] *Bonifaci & Berto*: *op cit.* No 89 and *Maso & Gazzetta* : *op cit.* No 89. Also see *supra* 1.5.
[137] *Palmisani* : *op cit.* No 36, par. 34-36.
[138] *Ibid.*, par. 34-35. For a criticism against the solution given by the Court on this point, see Dougan : *op cit.* No 90, pp. 112-113.

not be compared with the compensatory scheme established through the retroactive application of national implementing legislation.[139] On the contrary, this scheme is similar in terms of its objectives with the ordinary system of civil liability provided for by national law.[140] It is thus necessary to examine also the essential characteristics of the two systems, in order to determine whether they are indeed comparable for the purposes of the equivalence principle.[141] This is a matter left for the national court to decide, that possesses the necessary information to make the relevant assessment.[142]

The reasoning followed in this respect is very instructive. In order to be comparable, the legal actions concerned must pursue similar objectives. In any opposite case, they may not be possibly considered as similar. Provided that such a similarity of objectives exists, the national court should then establish their similarity also with regard to their essential characteristics. It is only after it has done so, that it can proceed with the comparison of the individual rules governing their application. If the national system does not provide for a similar domestic action, the principle of equivalence is met automatically and the only requirement imposed is that the conditions prescribed for the exercise of the rights that the law confers upon individuals must provide an effective degree of protection.[143] The conclusion thus drawn is that a governmental liability action can only be properly compared with domestic law claims pursuing a reparatory objective and having similar essential characteristics with it, especially as concerns the public status of the defendant.

It is thus apparent that, despite its similarity of objectives, the ordinary system of civil liability that governs the payment of damages for breaches committed by private parties cannot serve in this respect as a measure of comparison for the purposes of the equivalence principle. The essential characteristics of the systems of public and individual liability are different, even if they both have a compensatory nature. It does not thus matter, if the domestic legislation subjects liability actions between individuals to more favourable standards than those

[139] *Ibid.*, par. 37.
[140] *Ibid.*, par. 38.
[141] *Ibid.*
[142] *Ibid.* It was nevertheless opined that it might be appropriate to use as a measure of comparison the rules on the imposition of public liability arising from the belated adoption of a regulatory act provided for by an enabling statute (at point 39).
[143] *Ibid.*, par. 39.

applying under *Francovich*. National law is not precluded from laying down alongside the conditions applicable to proceedings between private parties special, detailed and less favourable rules regulating actions against the public authorities. The only requirement set in this direction is that the latter should apply without distinction in favour of claims of a domestic nature.[144] Although the relevant pronouncements have been made with regard to claims for the recovery of unlawfully levied charges, there is little doubt that their underlying rationale holds good also in respect of civil liability actions.

The principle of equivalence is not thus infringed by the mere fact that the domestic civil liability system provides for longer limitation periods, higher rates of interest and lower culpability standards than the ones applicable to public liability claims under *Francovich*. In order for such a violation to be established, it further needs to be shown that the more favourable national rules also apply to domestic law actions against the public authorities and that they are not confined exclusively to liability proceedings between private parties. That this is indeed so is exemplified by *Palmisani*.[145] The Court did not have sufficient information as to whether the ordinary domestic system of civil liability could also serve as a basis for damages actions against the public authorities for breach of their duties under national law. This uncertainty prevented it from giving a definite answer as to the suitability of this procedure to be considered as similar to the compensatory scheme, under which Italy purported to confer retroactively upon individuals the benefits that they were entitled to under a belatedly implemented measure. It left it thus to the competent national judge to decide whether the one year limitation period prescribed for the initiation of actions directed at the retroactive payment of those belatedly conferred benefits should be extended under the equivalence principle to five years, in order to be assimilated with what is provided for with regard to damages claims by Article 2043 of the Italian Civil Code.[146]

[144] *EDIS* : *op cit.* No 24, par. 36-37, *Spac* : *op cit.* No 52, par. 20-21, *Aprile* : *op cit.* No 24, par. 20-21, *Ansaldo Energia* : *op cit.* No 52, par. 29-30, *Dilexport* : *op cit.* No 24, par. 27-28, *Roquette Frères* : *op cit.* No 38, par. 29-30.
[145] *Palmisani* : *op cit.* No 36.
[146] *Ibid.*, par. 38.

4.3.2. The determination of the existence of the more favourable national standards : The final task for the national court is to ascertain whether the protection available in respect of the claim brought by the applicant is at least equivalent with the one offered to the properly identified similar domestic action. The comparison will take place between related rules, having similar functions and essential characteristics. The fact that certain arguments based on national law benefit from preferential treatment does not mean that this treatment should be accorded automatically to all legal arguments, irrespective of their nature.[147] To give an example, national courts are given sometimes the power to propose of their own motion the objection of *res judicata* and are placed often under the obligation to accept arguments not submitted for reasons of *force majeure* within the limitation period provided for by national law. This does not mean that they should do the same with regard to any legal rule, regardless of whether the case before them raises issues of *res judicata* and *force majeure.*[148]

The competent judge will take into account the role played by the provision in the procedure as a whole, as well as the operation and any special features of that procedure before the national courts.[149] This means that the various aspects of the applicable rules cannot be examined in isolation, but must be placed in their general context.[150] The national court is thus obliged to undertake a comprehensive as opposed to an individual examination of the various aspects of the substantive and procedural requirements, that it is called upon to compare.[151] This examination should not be carried out subjectively by reference to circumstances of fact, but must involve an objective and in the abstract comparison of the legal rules at issue.[152] This is necessary for reasons of legal certainty. If the comparison were attempted with regard to the factual circumstances of each individual applicant, the same rule could be found as more favourable for a given plaintiff and more restrictive for another. This could be so even in the context of the same litigation.[153]

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[147] Opinion of Advocate General Jacobs in *Peterbroeck* : *op cit.* No 11, point 20.
[148] *Ibid.*, points 22 *et seq.*
[149] *Levez* : *op cit.* No 50, par. 44, *Preston* : *op cit.* No 37, par. 61.
[150] *Preston* : *ibid.*, par. 62.
[151] Opinion of Advocate General Léger in *Preston* : *ibid.*, points 110 *et seq.*
[152] *Preston* : *ibid.*, par. 62.
[153] Opinion of Advocate General Léger in *Preston* : *ibid.*, point 115.

An important category of liability rules that give rise to interesting problems of comparability are the ones concerning the culpability standard, that needs to be established by the plaintiff. It will be recalled that *Francovich* has introduced a system that presupposes the existence, albeit in an indirect form, of a certain measure of reprehensible behaviour on the part of the defaulting public authorities.[154] The comparison with the respective arrangements under national law will thus be relatively straightforward, when the imposition of public liability for domestic law breaches is also linked with the concept of fault. It will suffice in such circumstances to ascertain whether the national standard of culpability that needs to be met with regard to the activity of a given domestic authority is more lenient than the one required by *Francovich*. In case of an affirmative answer, it will be necessary to extend its application even to cases brought under the doctrine so as to ensure the respect of the equivalence principle.[155] If the existence of any kind of illegality suffices thus under national law for the imposition of liability on the administration, it cannot be required from the applicant to establish the existence of a sufficiently serious breach with regard to similar breaches dealt with under *Francovich*.[156] The more restrictive culpability standard will be confined in such circumstances to violations committed by the other branches of government, for the liability of which national law does not provide for more lenient requirements.

Uncertainty arises from the moment that the domestic legal order introduces a system of objective public liability, dissociated from any concept of fault and dependent on the existence of special and abnormal loss suffered by the plaintiff.[157] Such rules are more favourable for individuals as concerns the required standard of culpability, but the solutions that they introduce as to the number of the affected persons and the gravity of the sustained loss go beyond what is permissible under *Francovich*.[158] They clearly have similarities with the rules provided for in the context of a system of subjective liability. They both aim at the reinstatement of the applicant in the financial position that he would have been in, had the public

[154] *Supra* 3.3.3.
[155] *Brasserie/Factortame III*: *op cit.* No 1, par. 66.
[156] This is especially the case in France and Belgium.
[157] This is especially the case with regard to liability for legislative breaches.
[158] *Supra* 3.3.1.1.

authorities not proceeded to a given kind of action. Notwithstanding this fact, it seems that they cannot be considered as comparable with them in terms of their functions and essential characteristics. This is because they find their justification in the need to apportion to the general public the costs of an activity which entails for certain individuals an exceptionally severe effect that needs to be borne by the society as a whole, without being flawed with illegality. They thus differ from public liability rules governing actions intending to make good any financial consequence linked with the breach of the principle of legality, regardless of the number of the affected persons and the gravity of the loss suffered by them. As such, they cannot serve as a measure of comparison for the purposes of the equivalence principle under *Francovich*. It will be still thus necessary to show the existence of a sufficiently serious breach, even if the liability of the defaulting public authority for similar domestic law breaches is established on an objective basis subject to proof of the existence of a serious and abnormal damage.

It is now clear that the principle of equivalence is infringed in any case that the action of the plaintiff is made subject to procedural rules and conditions, that entail additional costs and delays in comparison with similar domestic law claims.[159] It is not thus acceptable to subject *Francovich* actions to courts different from those that would normally have jurisdiction under the domestic arrangements on public liability, when this would oblige the applicants to follow a more complex and costly procedure with regard to claims brought under the doctrine. For the same reason, the previous exhaustion of the available national remedies can only be required, where the same obligation is imposed also upon individuals bringing public liability claims on purely domestic law arguments. It is further apparent that it does not matter for the operation of the equivalence principle whether the more favourable national rules have been introduced legislatively, administratively or judicially.[160] Any kind of discrimination is prohibited, even if it takes the form of a more indirect and disguised violation of the requirements of equal treatment.

[159] *Levez* : *op cit.* No 50, par. 51-52, *Preston* : *op cit.* No 37, par. 60.
[160] In this respect, the Opinion of Advocate General Jacobs in *Peterbroeck* : *op cit.* No 11, point 21.

Chapter Five : The impact of Francovich on the domestic systems of public liability and the regime governing the payment of damages by the political institutions.

5.1. Introduction : The conclusion reached thus far is that the national courts are obliged, when this is required by the principle of effective judicial protection, to order the payment of damages from the public treasury in order to make good any loss sustained by individuals due to the violation by the domestic authorities of their legal obligations. It does not matter in this respect the capacity in which the wrongdoer has committed the breach complained of by the applicant. It is further immaterial whether the infringement is attributed to the central government or rather to decentralised authorities and other public emanations. Certain of the substantive conditions that govern the application of *Francovich* have been determined judicially and constitute a manifestation of what an effective standard of protection is considered to be in the respective areas. They apply only to the extent that the domestic legal orders do not provide for more favourable criteria for the receipt of compensation. All other substantive, procedural and remedial issues continue to be governed by national law, subject to the respect of the principles of effectiveness and equivalence. This amounts in practice to a partial and minimum harmonisation of the conditions for the application of the *Francovich* doctrine.

This provokes interesting questions, with regard to the impact that *Francovich* may possibly have on the domestic arrangements on public liability. A distinction needs to be drawn at this point between two categories of cases, depending on the existence or absence of a Community law component in the violation that gives rise to the relevant damages suit. In the existence of such an element, the national courts are obliged to adjust the domestic solutions on the matter so as to ensure compliance with the standards of effectiveness set by the case law.[1] A similar process may also take place even outside the field governed by the doctrine. Although *Francovich* does not cover purely internal litigations, its spill-

[1] *Infra* 5.2.

over effect may lead indirectly to the reconsideration of the remedial protection offered to individuals against the illegal activity of the public authorities even with regard to entirely domestic law violations. This may prove necessary, in order to guarantee the respect of certain constitutional principles and to provide uniform judicial protection to individuals.[2] Taking the matter further, the developments under *Francovich* may prove a good opportunity to insert more logic and coherence into the regime of Community liability. They may serve as a source of inspiration and lead to the relaxation of the extremely stringent criteria, that often have to be met for the receipt of compensation from the defaulting institutions. It is thus necessary to examine the recent judicial pronouncements in this field and to determine the extent to which they point towards the unification of the conditions that govern the imposition of public liability for breach of Community law, regardless of whether the source of the illegality alleged by the applicant is the activity of a national authority or a political institution.[3]

5.2. The impact of Francovich on the domestic arrangements on public liability in cases with a Community law component : For claims brought under the doctrine, it will be often necessary to modify the domestic arrangements on the liability of the public authorities in order to meet the requirements set by *Francovich*. The need for the adjustment of the respective domestic solutions may arise primarily with regard to three major issues. In the first place, it may be necessary to extend the application of the doctrine even to violations that do not normally give rise under national law to the payment of damages from the public treasury. The courts may be equally obliged to modify the domestic substantive and procedural conditions for the imposition of public liability, so as to elevate them to the standards of protection required by the case law. Finally, they may be also called upon to set aside national limitations on the types of damage that may be made good from the public funds and to adjust the domestic provisions regulating the quantification of the loss suffered by individuals.

[2] *Infra* 5.3.
[3] *Infra* 5.4.

5.2.1. Impact on the types of liability that may give rise to damages : The operation of *Francovich* will necessitate the lifting of any absolute immunities conferred by national law upon the legislative authorities. This has been clearly established by the case law and has already been given practical effect in many national jurisdictions.[4] In *Brasserie du Pêcheur*[5], the *Bundesgerichtshof* reiterated the position that the imposition of liability under German law is not possible with regard to breaches attributed to the legislature.[6] This is because legislative measures do not normally affect directly the interests of specific individuals. It is not thus possible to consider that the activity of the legislature takes place with regard to third persons, as required by the domestic legislation for the payment of damages.[7] Notwithstanding this fact, the court went on to examine whether the plaintiff could derive a claim directly from the *Francovich* case law. It then recalled the principles introduced in this respect and came to the conclusion that the imposition of legislative liability under the doctrine was indeed possible, although it finally rejected the claim on its merits.[8] A similar approach was followed by the English courts in *Factortame IV*.[9] The principle of parliamentary sovereignty makes virtually unthinkable the imposition of liability under national law with regard to breaches attributed to the legislature proper. The situation is different, when the claim is brought on the basis of *Francovich*. In such circumstances, the principle of the infallibility of the legislature can no longer be put forward to negate the right of individuals to receive compensation under the conditions set by the case law.[10]

The same is the case in Greece. The law precludes the payment of damages for breaches concerning provisions serving the general interest. This has been interpreted as excluding the imposition of liability for allegedly unlawful legislative

[4] Cases C-46 & 48/93, *Brasserie du Pêcheur v. Germany and R. v. Secretary of State for Transport ex parte Factortame* [1996] ECR I-1029, par. 26 *et seq.*

[5] *Bundesgerichtshof*, decision of 24 October 1996, *Brasserie du Pêcheur SA v. Germany* [1997] 1 CMLR 971.

[6] *Ibid.*, par. 1-4.

[7] On the conditions governing the imposition of public liability under German law, see Wilms : 'Le droit Allemand', in Vandersanden and Dony (eds.) : *La Responsabilité des Etats Membres en cas de Violation du Droit Communautaire*, Bruylant 1997, pp. 65-93.

[8] In a recent case, the *Landgericht Bonn* has declared that the *Francovich* case law is so widely accepted at national level that it is no longer necessary to ask for further clarification on this specific point under the preliminary ruling procedure (*Landgericht Bonn*, (2000) 53 *NJW* 814).

[9] See the judgment of the English High Court in *R. v. Secretary of State for Transport, ex parte Factortame and others* [1998] 1 CMLR 1353, as confirmed by the Court of Appeal ([1998] 3 CMLR 192) and the House of Lords ([1999] 3 CMLR 597).

[10] On the conditions for the imposition of public liability under English law, see Smits and Vallery : 'Le droit Anglais' in Vandersanden/Dony (eds.) : *op cit.* No 7, pp. 95-148.

activity.[11] The basic exception to this rule concerns claims brought on the basis of *Francovich*.[12] This is very well exemplified by three decisions of the administrative justice.[13] The applicants were graduates of the national technological institutions and claimed damages on the basis of the failure to adopt certain legislative decrees for the safeguard of their professional position. The part of their claim based on national law was rejected, on the basis of the familiar argument drawn from the principle of the infallibility of the legislature. However, they also claimed compensation for the failure to adopt the national implementing measures required for the transposition in the domestic legal order of Directive 89/48.[14] With regard to this specific point, the court accepted that the *Francovich* case law gave them indeed a right to reparation. It then resorted to the preliminary reference procedure, asking for clarification on the conditions under which damages could be possibly ordered in such circumstances.

With regard to actions brought on the basis of *Francovich*, the national courts are thus called upon to extend the protection of their domestic provisions on public liability even to breaches attributed to the legislature. The same obligation arises also with regard to judicial violations, provided that the doctrine requires indeed the payment of damages from the national treasury for the illegal activity of the judiciary. It may even prove necessary to modify the domestic arrangements on the imposition of liability for breaches committed by public bodies and emanations, when the national legislation restricts excessively the chances of obtaining redress in such circumstances.[15] It should be nevertheless recalled that the law does not object to techniques, that transfer all ensuing liability on the shoulders of the administration.[16] It does not further prohibit the payment of damages directly from the specific public body involved in the violation, that gives rise to the relevant

[11] For example, *Areios Pagos* 665/1975, (1976) 2 *ToS* 495, *Areios Pagos* 1562/1986, (1987) 35 *NoB* 1043, *Areios Pagos* 13/1992, (1992) 33 *HellDni* 1432.
[12] Athens Administrative Court of Appeal 2174/1991, (1991) *EDDD* 618 and Athens Administrative Court of First Instance 5110/94.
[13] Athens Administrative Court of First Instance 4143/1995, 4144/1995 & 4145/1995 (annotated by Mouamcletzi : (1996) 16 *EEED* 162).
[14] Council Directive 89/48/EEC of 21 December 1988 on the mutual recognition of higher-education diplomas (OJ 1989, L19/16).
[15] It is thus reported by Andersson : 'Remedies for breach of EC law before Swedish courts', in Lonbay and Biondi (eds.) : *Remedies for Breach of EC Law*, Wylie 1997, pp. 203-222 that there might be a need to modify the Swedish rules on civil liability for breaches attributed to public bodies, in order to ensure compliance with the *Francovich* case law (pp. 214-220).
[16] *Supra* 4.2.3.1(e) and 2.4.1.

damages suit.[17] It suffices that individuals receive in any case an effective measure of protection. The national legal orders are also allowed to subordinate the initiation of public liability claims to the previous exhaustion of the alternative effective remedies available to the plaintiff.[18] Notwithstanding this fact, there are instances where the principle of effective judicial protection can only be satisfied through the application of *Francovich* to breaches that do not normally give rise to liability claims under national law. When this is so, the courts are obliged to proceed to the extension of the respective domestic standards even to such violations.

5.2.2. Impact on the conditions that govern the payment of compensation : As for the conditions that have to be met in order for the payment of damages from the public funds to be possible, *Francovich* requires the modification of all domestic criteria that fail to meet the effectiveness requirements as determined by the case law. This concerns both substantive and procedural law standards. The best example in this direction is given with regard to the type of fault, that needs to be established for the imposition of *Francovich* liability. It will be recalled that individuals are only entitled to receive compensation, when the loss that they have suffered emanates from the perpetration of a sufficiently serious breach.[19] This has been interpreted as requiring proof that the defendant did not show the duty of care expected from a normally diligent public authority placed under the same circumstances as the wrongdoer. The existence of culpability is thus measured on an objective basis. The manifest and grave disregard test is satisfied without having regard to the mentality of the defaulting authority and without requiring proof that the latter intended to commit the breach or that it even had consciousness of the illegality of its actions.

This has important repercussions for many public liability systems. The most striking example is given by the English legal order, where it is accepted that the imposition of any obligation to pay damages presupposes the previous classification of the illegal activity alleged by the plaintiff under a specific tort category.[20] The

[17] *Supra* 2.4.2.2.
[18] *Supra* 1.4. and 1.5.
[19] *Brasserie/Factortame III* : *op cit.* No 4, par. 51.
[20] According to the definition given by Glanville and Hepple : *Foundation of the law of tort*, Butterworths 1984, "a tort is a civil wrong recognised by the Common law, or by statutory extension of the Common law, or (possibly) in equity (but not being merely a breach of contract or breach of trust), the remedy for which is an action for damages".

three major torts provided for in this respect are those of negligence[21], breach of statutory duty[22] and misfeasance in public office.[23] For a long time, there was controversy as to the exact legal basis under which liability actions for Treaty violations should be brought in the national courts. It was originally suggested that such breaches may create new torts, unknown to the national legal order.[24] This innominate tort theory was rejected by the House of Lords in *Garden Cottage Foods*[25], where it was declared *obiter* that the violation of the competition law rules should be categorised as a breach of a statutory duty.[26] In *Bourgoin*[27], the majority of the Court of Appeal distinguished *Garden Cottage Foods* as referring to private law breaches. It then declared that the payment of damages with regard to infringements attributed to the public authorities would require proof of misfeasance in public office.[28]

The problem with this classification is that the establishment of misfeasance in public office presupposes existence of malice or knowledge on the part of the defaulting authority of the illegality of the activity that gave rise to the loss of the plaintiff.[29] Following thus *Francovich*, the House of Lords questioned whether *Bourgoin* was still good law.[30] Subsequent case law established that the

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[21] Negligence is "a tort consisting of a breach of a duty of care resulting in damage to the plaintiff. Negligence in the sense of carelessness does not give rise to civil liability unless the defendant's failure to conform to the standards of the reasonable man was a breach of a duty of care owned to the plaintiff, which has caused damage to him" (Martin : *A Dictionary of Law*, OUP, 3rd edition, 1994, p. 263).

[22] Breach of statutory duty is "a breach of a duty imposed on some person or body by statute. The person or body in breach of the statutory duty is liable to any criminal penalty imposed by the statute, but may also be liable to pay damages to the person injured by the breach if he belongs to the class for whose protection the statute was passed. Not all statutory duties give rise to civil actions for breach. If the statute does not deal with the matter expressly, the courts must decide whether or not Parliament intended to confer civil remedies" (Martin : *ibid.*, p. 44).

[23] In *Three Rivers District Council v. Bank of England* [2000] 2 WLR 1220, Lord Millet set out the elements of this tort as follows: "The tort is an intentional tort which can be committed only by a public official. From this, two things follow. First, the tort cannot be committed negligently or inadvertently. Secondly, the core concept is abuse of power. This involves other concepts such as dishonesty, bad faith and improper purpose...they are all subjective states of mind".

[24] *Application des Gaz SA v. Falks Veritas Ltd.* [1974] CMLR 75, par. 28. Also see Clarke J in *Three Rivers District Council and others v. The Governor and Company of the Bank of England* [1997] 3 CMLR 429, par. 70. With regard to damages actions for misimplementation breaches, it was suggested that "the claim should not be regarded as a claim for damages for the tort of misfeasance in public office, but rather as a claim of a different type not known to the common law, namely a claim for damages for a breach of a duty imposed by Community law or for the infringement of a right conferred by Community law".

[25] *Garden Cottage Foods Ltd. v. Milk Marketing Board* [1983] 3 CMLR 43, par. 25, (Lord Diplock).

[26] *Ibid.*, par. 15-16 (Lord Diplock). In *Arkin v. Borchard Lines Ltd.* [2000] EuLR 232, Colman J accepted that a claim for damages for breach of Articles 81 and 82 ECT could be classified as a right of action analogous to a claim for breach of statutory duty, which arises where the breach causes damage to the applicant.

[27] *Bourgoin SA and others v. The Ministry of Agriculture, Fisheries and Food* [1986] 1 CMLR 267.

[28] *Ibid.*, especially par. 120 *et seq.* (Parker LJ).

[29] On the conditions that need to be met for the payment of damages under each one of the torts provided for by the English legal system, see Hoskins : 'Rebirth of the Innominate Tort?', in Beatson and Tridimas (eds.) : *New Directions in European Public Law*, Hart Publishing 1998, pp. 91-100, especially pp. 93-96, Tatham : 'Les recours contre les atteintes portées aux normes communautaires par les pouvoirs publics en Angleterre', (1993) 29 *CDE* 605, Convery : 'State Liability in the UK after Brasserie', (1997) 34 *CMLRev* 603 and Smits and Vallery : *op cit.* No 10, pp. 105-110.

[30] *Kirklees Borough Council v. Wickes Building Supplies Ltd.* [1992] 2 CMLR 765, par. 28 (Lord Goff of Chieveley).

subordination of the payment of damages to the satisfaction of the very stringent misfeasance requirements contravened indeed the effectiveness standards.[31] On the basis of this clarification, it was finally declared that the correct basis for the initiation of *Francovich* claims against the domestic authorities is that of breach of a statutory duty.[32]

This is not to say that the matter should be considered as definitely settled. Indeed, the position is often put forward that it might be preferable to accept that *Francovich* breaches give rise to *sui generis* actions in the domestic legal order than to attempt the adaptation of existing torts to the particularities of the doctrine.[33] The fact nevertheless remains that it is now unanimously accepted that the applicant is not obliged to prove the existence of misfeasance in public office.[34] The *Francovich* case law has led thus to the reconsideration of the domestic arrangements on the causes of action, under which public liability actions based on the doctrine have to be brought in the national courts. This has important consequences for the required burden of proof. The payment of damages for the illegal activity of the domestic authorities is now possible, without being necessary to show that the wrongdoer has abused its public powers intentionally or consciously. It suffices that the normal duty of care required by a diligent public actor has not been adhered to.

5.2.3. Impact on the recoverable heads of damage and the domestic quantification criteria : The requirement that reparation must be commensurate with the loss or damage sustained so as to ensure the effective protection of individuals[35] may allow to receive reparation for certain types of loss that would not have been recoverable under a similar domestic law action. This is especially the case with regard to reparation for lost profits and claims for the payment of interest. When it was asked whether the payment of compensation under *Francovich* could be confined to damage inflicted to specific individual interests, it was clarified that

[31] *Brasserie/Factortame III* : *op cit.* No 4, par. 73.
[32] *Factortame IV* : *op cit.* No 9, par. 173.
[33] In this respect, Hoskins : *op cit.* No 29 and Craig : 'The Domestic Liability of Public Authorities in Damages: Lessons from the European Community', in Beatson and Tridimas (eds.) : *op cit.* No 29, pp. 75-90, at p. 80-83.
[34] In this direction, see the relevant statements of Lord Steyn and Lord Millett in *Three Rivers* : *op cit.* No 23, at pp. 1235 and 1273. Also see the conclusion of the High Court in *R. v. Secretary of State for Transport ex parte Factortame Ltd. and others* [2001] 1 CMLR 47, par. 126.
[35] *Brasserie/Factortame III* : *op cit.* no 4, par. 82.

the total exclusion of reparation for lost profits would violate the effectiveness requirements. Such an exclusion would make it often practically impossible to receive any kind of redress in the context of litigation with an essentially economic or commercial nature.[36] This will certainly require adjustments in those domestic legal systems that are still facing difficulties to recognise the payment of damages for pure economic loss.[37] In the same way, the payment of interest at a reasonable rate should always be available as a means of reinstating a belatedly conferred benefit to its original financial value. Interest constitutes an essential component of the compensation due and should be thus guaranteed in all cases, even if the applicant has not suffered any other capital loss.[38]

5.3. The impact of Francovich on the national arrangements on public liability in purely domestic litigations : The bottom line is that the *Francovich* jurisprudence has introduced a certain degree of homogeneity among the national legal orders, at least with regard to public liability claims brought on the basis of the doctrine. It is certainly true that this harmonisation is incomplete, in the sense that it is often interrupted by the application of diverse national standards on matters of substance, procedure and quantification of the loss. This is due to the operation of the equivalence proviso and to the exercise of the discretion, that each legal system possesses in the context of the principle of national procedural autonomy to give effect to the *Francovich* requirements in the way that suits best its respective domestic arrangements. The national courts are not nevertheless allowed to apply any domestic law requirements that fail the effectiveness criteria, as determined by the relevant case law. They are rather obliged either to create a new public liability regime applicable exclusively with regard to *Francovich* or to accommodate the doctrine under the already existing legal bases, with the mere setting aside of any

[36] *Ibid.*, par. 87.

[37] Van Gerven : 'Bridging the unbridgeable : Community and national tort laws after Francovich and Brasserie', (1996) 45 *ICLQ* 507 reports that this is the case under the English and the German national legal orders. He refers to the decision of the English Court of Appeal in *Spartan Steel & Alloys Ltd. v. Martin & Co. (Contractors Ltd.)* [1973] 1 QB 27 and the judgment of the *Bundesgerichtshof* of 4 February 1964, (1964) 17 *NJW* 720. Similar problems also arise in the Spanish legal system, where the courts do not seem to recognise the right to receive compensation for lost profits and missed opportunities (Bribosia: 'Le droit Espagnol', in Vandersanden and Dony (eds.) : *op cit.* No 7, pp. 183-233, at p. 212).

[38] In this respect, see Cases C-397 & 410/98, *Metallgesellschaft and others v. Commissioners of Inland Revenue and HM Attorney General* [2001] ECR I-1727, par. 90 *et seq.*

inconsistent national law condition. There is thus the creation of a body of uniform public liability law, that sets the minimum standards that all national jurisdictions should comply with. This leads to a considerable degree of harmonisation with regard to the level of protection that should be in any case available to individuals across the Community.

The above described operation of *Francovich* leads to what is sometimes referred to as the paradox of the two paradigms of law.[39] This actually describes the situation where individuals receive a different level of protection by the national courts, depending on the legal source that they purport to base their action upon. Indeed, *Francovich* does not require the modification of the national public liability systems with regard to purely domestic litigation. This is due simply to the fact that claims based exclusively on national law grounds operate outside the sphere of application of the doctrine and do not thus receive any kind of protection under the relevant case law. There is thus the creation of a discriminatory system of public liability, that places in a disadvantageous position those claiming compensation under national law. To give an example, recall the situation in *Brasserie du Pêcheur*. The plaintiff was claiming damages for lost profits in circumstances, where their payment was not normally possible under national law. Had its claim been based on entirely domestic law grounds, it would have probably been rejected on the basis that the loss of the opportunity to market products from another country is not considered in Germany as part of the protected assets of a commercial undertaking. Since the action was nevertheless brought on the basis of *Francovich*, it was held that total exclusion of loss of profit as a head of damage would violate the effectiveness requirements.[40]

This is a phenomenon that is not unique to the public liability area. It also appears in any field touched upon by the Treaty. Its existence is basically due to the fact that the effectiveness principle entrusts the national courts with a different role than the one that they traditionally perform in their domestic legal order. It introduces exceptions to the subordination of the judiciary to the legislative will, to

[39] In this respect, see especially Fernandez Esteban : 'National Judges and Community Law : The Paradox of the Two Paradigms of Law', (1997) 4 *MJ* 143.
[40] *Brasserie/Factortame III* : *op cit.* No 4, par. 87.

the extent that this is necessary to ensure the respect of the obligations undertaken at a superior legal level. On the contrary, the solutions given by the national legislature continue to be binding on the courts with regard to purely domestic law issues.[41] This results in the creation of two different sets of rules, that govern similar claims. As a result, individuals may receive a different level of remedial protection in comparable circumstances. While the principle of effectiveness reduces thus the divergences among the various legal orders with regard to actions covered by its protective scope, it introduces disparities in national law that operate against those bringing claims of a domestic nature.[42]

Community law may nevertheless have a more indirect and certainly less apparent effect even to those parts of the national legislation, that remain totally intact from the developments in the case law.[43] This will not take place under the effectiveness requirements. Neither will it be due to the principle of equivalence, since the latter does not prohibit the less favourable treatment of claims based on entirely domestic law grounds. It will rather arise as a result of the fact that it might prove difficult in practice for the courts to maintain at national level two different judicial standards, depending on the source of the protection relied upon by the plaintiff.[44] To do so could be even interpreted as a contravention of certain fundamental constitutional guarantees, mainly those introducing the equality of citizens before the law and the principle of non-discrimination. Suffice it to note at this point that nothing under the Treaty precludes the extension of the more protective standards developed by the case law to purely domestic litigations, should this prove necessary to ensure compatibility with the national constitutional requirements.[45]

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[41] Fernandez Esteban : *op cit.* No 39, pp. 144-146.

[42] Jacobs : 'Remedies in National Courts for the Enforcement of Community Rights', in Perez Gonzalez (ed.) : *Hacia un nuevo orden internacional y europeo. Estudies en homenaje al Profesor Manuel Diez de Velasco*, Tecnos 1993, p. 983, Van Gerven : 'Bridging the gap between Community and national laws : Towards a principle of homogeneity in the field of legal remedies?', (1995) 32 *CMLRev* 679, pp. 699-700, Van Gerven : *op cit.* No 37, p. 538.

[43] Van Gerven : *op cit.* No 42, pp. 699-701, Van Gerven : *op cit.* No 37, pp. 537-539, Craig : *op cit.* No 33, pp. 83-89, Craig : 'Francovich, remedies and the scope of damages liability', (1993) 109 *LQR* 595, p. 620, Craig : 'Once more unto the breach : The Community, the State and damages liability', (1997) 113 *LQR* 67, pp. 89-94, Waelbroeck : 'Treaty violations and liability of Member States and the European Community : Convergence or Divergence?', in Curtin and Heukels (eds.) : *Institutional Dynamics of European Integration*, Essays in Honour of Henry Schermers, Nijhoff Publishers 1994, pp. 467-483, p. 476.

[44] Fernandez Esteban : *op cit.* No 39, p. 145.

[45] For example, Case C-132/93, *Volker Steen v. Deutsche Bundespost* [1994] ECR I-2715.

5.3.1. The operation of the spill-over effect of Community law outside the field of governmental liability : It is certainly premature at this stage to try to predict the extent to which the *Francovich* case law may indeed have such an impact on the domestic arrangements on public liability. It is nevertheless important to note that similar developments have already taken place in certain other legal fields, leading to the improvement of the judicial protection afforded to individuals under national law in the respective areas. The most notable examples in this regard are given by the changes in the fields of interim relief and restitution.

The developments in the former area were triggered by the decision in *Factortame.*[46] It was declared there that the courts are obliged under the Treaty to set aside national rules that prevent them from granting interim relief, when they consider that this prohibition is the sole obstacle to the provision of effective protection to the applicant.[47] The opposite would impair the application of the principles of effectiveness and supremacy. This ruling had very serious repercussions for the jurisprudence of the English courts. It practically meant that the traditionally accepted principle prohibiting the order of interim relief against statutory legislation could no longer apply with regard to claims falling within the scope of the *Factortame* principle. On the other hand, this prohibition was still applicable in purely domestic law litigations. The end result was that individuals were receiving a different measure of protection, depending on whether they managed to establish the existence of a Community law element in their case. In *M v. Home Office*[48], the House of Lords described this difference of treatment as an unhappy situation.[49] It added that it would be very regrettable, if an approach which was inconsistent with the one pertaining at the Treaty level were allowed to persist in national law in circumstances where this would not be strictly necessary.[50] It departed thus from its previous case law and interpreted section 31 of the Supreme Court Act 1981 as recognising to the courts the jurisdiction to order interim relief against domestic statutes, even in the context of internal litigation. It justified its

[46] Case C-213/89, *R. v. Secretary of State for Transport, ex parte Factortame Ltd. and others* [1990] ECR I-2433.
[47] *Ibid.*, par. 21.
[48] *M. v. Home Office* [1993] 3 All ER 537 (see Harlow : 'Accidental Loss of an Asylum Seeker', [1994] 57 *MLRev* 620).
[49] *Ibid.*, p. 551 (Lord Woolf).
[50] *Ibid.*, p. 564 (Lord Woolf).

decision by declaring that the protection of the rights of individuals under national law may be just as important as under the field covered by the Treaty.[51]

A similar reasoning was employed by the Spanish *Tribunal Supremo* in an appeal against a decision of a lower court, refusing to suspend the application of an administrative measure obliging the plaintiffs to cease operating a sheep farm.[52] The litigation was purely internal. Notwithstanding this fact, inspiration was drawn from the *Factortame* case law. It was eventually concluded that the right to effective judicial protection made it necessary to relax the traditionally restrictive interpretation of the applicable domestic legislation and to allow the provision of interim relief on a general basis, so as to give effect to the requirements of the relevant constitutional guarantees. It was emphasised that the pervasive character of this constitutional provision and its value against whatever irrational overvaluation of administrative privileges is nowadays imposed by a general principle adopted implicitly in *Factortame*.[53]

It is submitted that important developments in this field have also taken place as a result of the decision in *Atlanta*.[54] It was declared there that the national courts are required to offer even positive interim relief against domestic legislation giving effect to allegedly illegal measures adopted by the political institutions, when this is necessary in order to ensure the provision of effective judicial protection to the applicant. Such an obligation exists, even when such a possibility is not provided for under national law for purely domestic litigations. It now seems that this development has already exerted an influence on certain domestic legal orders, for which the staying of the challenged decision constituted traditionally the only form of interim protection in disputes with the public authorities.[55]

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[51] *Ibid.*, p. 551 (Lord Woolf).

[52] *Tribunal Supremo Contencioso-administrativo*, sala 3ª, section 5ª, decision of 20 December 1990, (1990) *Repertorio de Jurisprudencia* 10412. The case is referred to by Caranta: 'Learning from our Neighbours : Public Law Remedies Homogenization from Bottom Up', (1997) 4 *MJ* 220, pp. 225-226 and Fernandez Esteban : *op cit.* No 39, pp. 148-149.

[53] *Ibid.* (translation by Fernandez Esteban). For more information on the impact that the *Factortame* jurisprudence has had on the various national legal orders, see Schwarze : 'The Convergence of the Administrative Laws of the EU Member States', in Snyder (ed.) : *The Europeanisation of Law*, Hart Publishing 2000, pp. 163-182, at pp. 170-171.

[54] Case C-465/93, *Atlanta Fruchthandelsgesellschaft v. Bundesampt für Ernährung und Forstwirtschaft* [1995] ECR I-3761.

[55] Caranta : *op cit.* No 52, p. 226. Reference in this respect is made to the developments in the French and Spanish legal systems, as described respectively by Debbasch : 'Le juge administratif et l'injonction : La fin d'un tabou', (1996) *JCP* I 3934 and García de Enterría : (1993) *REDA* 475.

With regard to restitution, the case law has established that money unlawfully levied should be repaid and that any restrictive conditions set in this respect by the domestic legislation should be set aside. It does not matter in this direction whether the same restrictions apply also to sums collected by the public authorities in contravention of national law.[56] The principle of effectiveness has thus resulted to the modification of certain national standards, that meet the equivalence requirements and which continue being applicable as concerns similar domestic law claims. The need to guarantee parity of treatment between individuals with regard to restitution actions motivated the House of Lords to recognise in *Woolwich* the right to recover money levied contrary to national law, in circumstances where this would not be normally possible under the provisions of the domestic legislation.[57] The decision to proceed to such a step was justified by declaring emphatically that it would be strange, if the right of individuals to recover overpaid charges was to be more restricted under domestic law than it is under the Treaty. Such a divergence could no longer thus be maintained.[58]

Similar developments have taken place in several other legal areas.[59] An interesting example in this respect is provided for by the principle of legitimate expectations. This constitutes an aspect of the principle of legal certainty and its protection is guaranteed implicitly under the provisions of the Treaty.[60] In a case brought before the French *Tribunal administratif de Strasbourg*, the applicant claimed that the administration had violated its legitimate expectations by terminating suddenly its licence to import urban waste following the adoption of new rules prohibiting such an activity.[61] The litigation was purely domestic. At the time that the case was heard, French administrative law did not recognise the

[56] Case 199/82, *Amministrazione delle Finanze dello Stato* v. *San Giorgio* [1983] ECR 3595.

[57] *Woolwich Building Society v. Inland Revenue Commissioners (No 2)* [1992] All ER 737.

[58] *Ibid.*, p. 764 (Lord Goff). In this respect, see Birks : 'When money is paid in pursuance of a void authority', [1992] 37 *PL* 580 and Lewis : 'L'influence du droit communautaire sur le droit administratif anglais', (1996) 52 *AJDA*, numero spécial, 124.

[59] It is thus reported by Dubos : 'Le principe de la responsabilité de l'Etat pour violation du droit communautaire', (1997) 7 *RAE* 209, at footnote No 54, that the French legislation implementing Directive 89/665/EEC of 21 December 1989 on the co-ordination of laws, regulations, administrative provisions relating to the award of public supply and the public work contracts (OJ 1989, L395/33) is applied not only to public markets of a Community nature but also to an important category of administrative contracts with a purely internal dimension.

[60] For example, Case 120/86, *Mulder v. Minister van Landbouw en Visserij* [1988] ECR 2321 and Case C-152/88, *Sofrimport Sàrl v. Commission* [1990] ECR I-2477.

[61] *Tribunal Administratif de Strasbourg* (conclusions by Pommier), decision of 8 December 1994, (1995) 51 *AJDA* 555 (annotated by Heers : 'La sécurité juridique en droit administratif français : vers une concécration du principe de confiance légitime', (1995) 11 *RFDA* 963). The case is referred to by Cararta : *op cit.* No 52, p. 228.

protection of the legitimate expectations of individuals as an established legal principle. Notwithstanding this fact, the court drew inspiration from the protection afforded in similar circumstances by other national jurisdictions. It also referred to the situation under the Treaty. It then went on to hold the administration liable for its failure to provide for derogations in favour of the legitimate expectations of individuals that arose under the anterior legal regime.

It is submitted that the operation of the spill-over effect is determined by two basic factors.[62] In the first place, by the judicial perception as to whether the incorporation in national law of instruments and techniques developed by foreign jurisdictions might be beneficial for the functioning of the domestic legal order. Secondly, by the assessment of the extent to which this would affect the relationship of the courts with the legislature and the administration and change the role entrusted to the national judges with regard to the political power. The greater thus the political implications involved in the judicial extension to purely internal litigations of standards developed at a different legal level, the more difficult it becomes for the courts to proceed to the modification of what has been traditionally accepted by national law on a given legal issue. A good example in this respect is given by the principle of proportionality and the reluctance of the English judges to accept it as a ground of review for administrative action in purely domestic cases.[63]

It has progressively been established that the national authorities are obliged to respect the proportionality requirements, when they operate within the scope of application of the Treaty.[64] The English courts are thus required to examine whether the action of the public administration has not gone beyond what is necessary for the attainment of the specific objectives pursued under its provisions.[65] A different approach is followed, when the litigation is of a domestic nature. In such a case, the legality of the administrative action is determined under the standard of *Wednesbury*

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[62] Anthony : 'Community Law and the Development of UK Administrative Law : Delimiting the 'Spill-Over' Effect', (1998) 4 *EPL* 253, pp. 273-276.

[63] See especially De Burca : 'Proportionality and *Wednesbury* Unreasonableness : The influence of European concepts on UK Law, (1997) 3 *EPL* 561, Jowell : 'Is Proportionality an Alien Concept ?', (1996) 2 *EPL* 401 and Anthony : *ibid.*, pp. 267-273.

[64] For example, Case 5/88, *Wachauf v. Bundesamt für Ernährung und Forstwirtschaft* [1989] ECR 2609.

[65] This is especially the case with regard to the application of national legislation derogating from the provisions on free movement of goods, persons and services. For example, see the assessment of the proportionality principle by the UK courts with regard to the Sunday trading laws in *Stoke City Council v. B & Q plc* [1990] 3 CMLR 31, *Wellingborough BC v. Payless* [1990] 1 CMLR 773, *B & Q plc v. Shrewsbury BC* [1990] 3 CMLR 535 and *Payless v. Peterborough CC* [1990] 2 CMLR 577 (on this issue, also see Arnull : 'What Shall We Do On Sunday ?', (1991) 16 *ELRev* 112).

unreasonableness.[66] The courts are motivated in this respect by the wish to minimise judicial involvement in the political decision making. Under this test, it is only the most unreasonable decisions that can be possibly quashed in judicial proceedings. It was originally suggested by the House of Lords that the time might have come to update the national grounds of judicial review and to incorporate the principle of proportionality as one of them.[67] However, it was subsequently declared in *Brind* that proportionality does not constitute a ground of judicial review under national law.[68] What seems to underlie this judgment is the concern that the opposite would supersede the domestic standard of unreasonableness and oblige the national courts to proceed to delicate political assessments with regard to the existence of a less restrictive means of administrative action.[69] The door was left nevertheless open for a future reconsideration of the law on the matter.[70] Subsequent cases suggest that the courts are now applying a test similar to that of proportionality, requiring from the public administration to show the existence of an important compelling public interest with regard to decisions affecting individual liberties.[71]

5.3.2. The operation of the spill-over effect in the field of public liability : This brings forward the question of whether it is indeed likely to experience under the influence of *Francovich* a similar modification of the liability rules that govern the payment of damages for national law breaches committed by the public authorities. As a point of departure, it should be clarified that it is not any differentiated treatment of similar claims that can be interpreted as entailing discrimination against domestic law actions. This can only be so, when the disparity of the applicable legal standards cannot be possibly justified on the particularities of the legal order established by the Treaty and its hierarchical relationship with national law. For

[66] *Associated Provincial Picture Ltd. v. Wednesbury Corp.* [1947] 1 KB 223.
[67] *Council of Civil Service Unions v. Minister for Civil Service* [1985] AC 374, at p. 410 (Lord Diplock). The relevant statement has as follows : "That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in future of the principle of 'proportionality' which is recognised in the administrative law of several of our fellow members of the European Economic Community".
[68] *R. v. Secretary of State for the Home Department, ex parte Brind and others* [1991] 2 WLR 588.
[69] *Ibid.*, pp. 606-610 (Lord Lowry).
[70] *Ibid.*, pp. 593-594 (Lord Roskill). It was suggested that *Brind* was not the appropriate case to develop the law in the way proposed by the applicant. Also see the speech of Lord Ackner (pp. 595-606), submitting that the principle of proportionality can only become a ground of review of administrative action when the European Convention on Human Rights is incorporated in the domestic legal order.
[71] *R. v. Ministry of Defence, ex parte Smith* [1995] 4 All ER 427, at p. 445 (Brown LJ).

example, the mere fact that the availability of legislative liability is guaranteed under *Francovich* does not mean automatically that individuals bringing similar claims under national law are discriminated against due to the absence of such a remedy in their domestic legal order. Indeed, the payment of *Francovich* damages for unlawful legislative activity finds its normative justification in the infringement of the principle of primacy. Compensation is ordered exactly due to the violation of a legal standard hierarchically superior to national law.[72] The situation differs in the domestic context, where the legislative activity constitutes the supreme parameter of legality.[73] It is thus difficult to find at national level a higher legal standard, against which the legality of the conduct of the legislature can be possibly measured. It should be thus expected that the *Francovich* jurisprudence will not entail a substantial impact on the domestic arrangements on the availability of public liability for legislative activity, save where the infringed legal norm operates at a level higher than the one of the ordinary national legislation. Outside the field occupied by international law, this will only be the case with regard to breaches of national constitutional provisions and the general principles of law.

On the contrary, there does not seem to exist any plausible reason why individuals should be subjected to differentiated standards of protection with regard to the availability of damages for administrative and judicial breaches. The same holds true also as concerns the culpability criteria for the receipt of compensation from the national treasury and the types of loss that can be made good from the public funds. The national courts may thus be inclined to adopt in this respect what is better known as a homogeneity friendly interpretation of their domestic legislation[74], in order to elevate the remedial protection offered in the context of purely domestic litigation to the one available under *Francovich*. The convergence of the national rules that has taken place with regard to claims brought under the doctrine may lead thus to the modification of the rules applicable to similar domestic claims, so as to reduce the disparities between the two paradigms of law.[75]

[72] *Supra* 2.2.2.2.
[73] *Supra* 2.2.2.1.
[74] Defined as the "spill-over of techniques and instruments of Community law to matters of purely internal law" (Fernandez Esteban : *op cit.* No 39, p. 148.
[75] Van Gerven : *op cit.* No 37, p. 539.

The end result may be the harmonisation of national liability laws regardless of the basis upon which the claim is brought and the indirect creation of a higher level of individual protection, even outside the field occupied by the Treaty.[76]

Such a development has already taken place in the context of the Italian system of public liability. It will be recalled that the Italian legal theory and practice reserved traditionally the payment of damages from the national treasury only for breaches of provisions containing subjective rights.[77] The receipt of compensation was not possible with regard to violations of simple protected interests.[78] This gave rise to problems in the application of *Francovich* by the national courts, that could often amount to the negation of any kind of protection to individuals contrary to the principle of effectiveness. The problem existed especially with regard to breaches of non-directly effective provisions. These entail by definition a great margin of discretion for the domestic authorities, precluding thus the creation of any subjective rights for their intended beneficiaries. Given this situation, it was considered necessary to adopt a specific legislative decree[79] in order to ensure that those affected by the belated transposition in the domestic legal order of the legislation on the protection of individuals in the event of the insolvency of their employers[80] would finally receive from the designated guarantee institution reparation for any loss that they had suffered as a result. Subsequent case law clarified that this legislative intervention had taken place within the limits of the principle of national procedural autonomy and that it constituted thus a legitimate way of giving effect to the *Francovich* requirements.[81]

The question that remained open was what would have actually happened in the absence of the legislative decree giving retroactive effect to the national implementing measures. The early case law of the *Corte di Cassazione* seemed to suggest that the payment of damages would not have been possible in such a case on

[76] Jacobs : *op cit.* No 42, p. 983.
[77] *Supra* 1.5.
[78] For example, *Corte di Cassazione* No 1217 of 15 April 1958, [1958] *RARI* 479 and *Corte di Cassazione* No 2667 of 5 March 1993, [1993] I *Il Foro Italiano* 3062.
[79] *Decreto Legislativo* No 80 of 27 January 1992, (1992) GURI No 36 of 13 February 1992.
[80] Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of the employer (OJ 1980, L283/23).
[81] Cases C-94 & 95/95, *Bonifaci and Berto* v. *INPS* [1997] ECR I-3969, Case C-373/95, *Maso & Gazzetta* v. *INPS* [1997] ECR I-4051, Case C-261/95, *Palmisani v. INPS* [1997] ECR I-4025. Also see *supra* 1.5.

the basis of the provisions of national law on civil liability.[82] This was established on an apparently mistaken interpretation of the principle of national procedural autonomy and the limits of the latitude left under it to the domestic legal orders.[83] This position was relaxed considerably in subsequent cases.[84] It was accepted there that the principle of effectiveness requires the availability of a damages remedy to individuals and that the national judges must guarantee its existence, even in the absence of specific legislation on the matter.[85] It was finally declared that the relevant right to compensation flows directly and immediately from the domestic provisions on civil liability, as prescribed by the Italian Civil Code.[86]

It was thus established that the right to receive *Francovich* damages should be guaranteed even with regard to provisions that would be normally classified under national law as giving rise to simple protected interests. That practically meant that the imposition of public liability under the doctrine would be possible, even in circumstances where no such remedy would exist for similar domestic law violations. Such a development had already taken place in the field of public procurement, as a result of the transposition at national level of Directive 89/665.[87] This measure provides for the payment of damages, in case of injury sustained as a result of the application by the public administration of unlawful contract award procedures. Its importance for our purposes lies in the fact that the discretion enjoyed by the administration in this specific area confers upon the undertakings that participate in the public procurement procedure simple protected interests, that would not normally give rise to a right to reparation under national law.[88]

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[82] For example, *Corte di Cassazione* No 10617 of 11 October 1995 and No 401 of 19 January 1996, [1996] I *Il Foro Italiano* 503. On this early case law of the *Corte di Cassazione*, see especially Malferrari : 'State Liability for Violation of EC Law in Italy : The Reaction of the Corte di Cassazione to *Francovich* and Future Prospects in Light of its Decision of July 22, 1999, No 500', (1999) 59 *ZaöRV* 809, pp. 811-822.

[83] Anagnostaras : 'State liability v. Retroactive application of belated implementing measures : Seeking the optimum means in terms of effectiveness of EC law', [2000] 1 *Web JCLI*, section 3.

[84] *Corte di Cassazione* No 7770 of 23 August 1996, *Republica Italiana* [1996] *Il Fallimento* 69, *Corte di Cassazione* No 8552 of 27 September 1997, *Lorella* [1997] *Il Fallimento* 185, *Corte di Cassazione* No 133 of 9 January 1997, *Campanelli* [1997] *Il Foro Italiano* 14 and *Corte di Cassazione* No 1366 of 10 February 1998, *Pacifico* [1998] I *Il Foro Italiano* 1469.

[85] For a detailed analysis of these decisions, see Malferrari : *op cit.* No 82, pp. 823-831.

[86] *Corte di Cassazione* No 5846 of 11 June 1998, (1998) I *Giustizia Civile* 2468.

[87] Directive 89/665/EEC : *op cit.* no 59. Implementation took place by virtue of law No 142 of 19 February 1992, (1992) GURI No 42 of 20 February 1992. The payment of damages is provided for in Article 13 thereof.

[88] Merola and Beretta : 'Le droit Italien', in Vandersanden and Dony (eds.) : *op cit.* no 7, pp. 289-349, at footnote No 73, report that the scope of application of Article 13 of law No 142 has been extended by virtue of Article 32 of framework law No 109 of 11 February 1994 on public markets and Article 11 of law No 146 of 22 February 1994 on the public market of services.

Following these developments, the position was put forward at doctrinal level that a similar evolution of the law should take place even in fields that are not touched upon by the Treaty. The initial response given by the *Corte di Cassazione* was negative.[89] The case involved an individual complaining for the delay with which a local community finally gave him the permission to build on his land. The applicant claimed damages for any loss that he had sustained as a result. His action was rejected at first and second instance, on the basis that it was not possible to receive compensation for the violation of a simple protected interest. When the case reached the *Corte di Cassazione*, he put forward the argument that the mere fact that he did not enjoy a subjective right should not lead to the automatic negation of the possibility to receive compensation from the public funds. He relied on the existence of certain important legislative and judicial developments and referred to the *Francovich* case law and the domestic legislation in the field of public procurement.

His argument was rejected. The part of the claim based on *Francovich* was dismissed by distinguishing the liability arising under the doctrine from the one alleged by the applicant with regard to the violation of national law conferring simple protected interests. It was declared that they were not comparable, given the completely different theoretical foundations that they are based upon. The court proceeded then to examine the possibility of extending the payment of damages for simple protected interests outside the public procurement field. It found that this could not be sustained and added that, since the legislature felt the need to make explicit provision for the payment of compensation in the specific area, this meant that it was not possible to accept that there existed a general principle affording financial protection to individuals for breaches of simple protected interests. The transposition of the public procurement Directive could not be thus interpreted as implying the existence of a legislative tendency towards the payment of damages to individuals for violations of provisions that do not give rise to any subjective rights.[90]

[89] *Corte di Cassazione* No 2667 of 5 March 1993 (*op cit.* No 78). In the same direction, also see *Corte di Cassazione* No 3732 of 20 April 1994, (1994) I *Il Foro Italiano* 3050.

[90] Exactly in the same direction, see *Corte di Cassazione* No 10800 of 16 December 1994. The decision was given with regard to the possible extension beyond the field of application of Community law of Article 32 of law No 109 of 11 February 1994 and Article 11 of law No 146 of 22 February 1994 (*op cit.* No 88). See Merola and Beretta : *op cit.* no 88, pp. 342-345.

The change of the case law on this point has been spectacular. In another action having to do with building licences, the applicant was claiming damages for the exclusion of his lot from the areas upon which building was allowed.[91] This had taken place on the basis of a zoning rule, that was subsequently declared invalid by the *Consiglio di Stato*. The objection put forward by the defendant was that the plaintiff enjoyed only a protected interest with regard to the public authorities. He was not thus entitled to the receipt of compensation from the national treasury. The answer given by the *Corte di Cassazione* redesigned the national regime of public liability and narrowed the gap in the judicial protection of individuals in damages actions of a domestic nature. It was held that it cannot be inferred from the wording of Article 2043 of the Civil Code that the right to reparation for the illegal activity of the domestic authorities exists only for violations of subjective rights.[92] It was then added that this provision is applicable to any individual interest significant for the domestic legal order.[93] In order to find whether an individual interest is significant enough to give rise to the payment of damages, it must be examined whether its sacrifice can be justified by an overriding public interest. When this is not the case, its violation by the public authorities may lead to the imposition of monetary liability. This is so, even when the infringed legal norm does not give rise to the creation of a subjective right in favour of its beneficiary.[94]

One of the most interesting features of this judgment lies in its reference to the developments in the public procurement field as one of the reasons that justified the reconsideration of the traditional approach on the exclusion of public liability for breaches of simple protected interests.[95] Rather surprisingly, no similar mention was made to the *Francovich* jurisprudence and the implications that the latter entailed for the domestic legal order. Notwithstanding this omission, the fact remains that this case constitutes a clear example of how the Treaty solutions on the liability of the public authorities can influence the domestic arrangements on the matter even with regard to purely internal litigation. It is also relevant in this respect to refer to an

[91] *Corte di Cassazione* No 500 of 22 July 1999. This case is analysed in detail by Malferrari : *op cit.* No 82, pp. 832-837.
[92] *Ibid.*, par. 8 and 9.
[93] *Ibid.*, par. 8.
[94] *Ibid.*
[95] *Ibid.*, par. 6.1.

interesting statement made by the English Court of Appeal in *Factortame IV*.[96] It was declared that there might be the need in the future to reconsider the domestic arrangements on the remedial protection of individuals for damage caused by the enactment of legislation in breach of a superior legal rule, even outside the field covered by *Francovich*. It was added that the developments under the doctrine might make it necessary at some point to assess whether there must be a change in the traditional approach on the issue, which currently precludes the payment of damages in such circumstances under national law.[97]

5.4. The impact of Francovich on the regime of Community liability : The above discussion seems to confirm that *Francovich* may operate as a medium for the harmonisation of the national laws on public liability and the improvement of the level of judicial protection available to individuals, even in fields regulated entirely by the domestic legislation. However, it would be mistaken to conclude that its impact is exhausted to the modification of the domestic standards of public liability. The doctrine may also exercise a similar influence on the conditions that regulate the payment of compensation for the illegal activity of the political institutions.

The imposition of liability on these institutions was characterised until very recently by the operation of a dual set of conditions.[98] For damage inflicted through administrative activity, it normally sufficed to establish the existence of damage causally linked with the illegal conduct of the defendant. For violations committed in fields where the defendant was called upon to exercise legislative powers and to make difficult discretionary choices of economic policy, damages were paid only subject to the establishment of a sufficiently serious breach of a superior rule of law for the protection of the individual. The crucial criterion for the determination of the applicable test was theoretically the measure of the discretion enjoyed by the wrongdoer in the perpetration of the breach. The mere proof of illegality did not

[96] *Factortame IV* : *op cit.* no 9, par. 34.
[97] *Ibid.*, par. 34. Also see Steyn LJ in *Elguzouli-Daf v. Commissioner of Police of the Metropolis and another; McBrearty v. Ministry of Defence and others* [1995] QB 335, [1995] 1 All ER 833, [1995] 2 WLR 173. The case involved a claim in damages for negligence against lawyers engaged in criminal prosecution matters. The court concluded that no damages were available on the facts of the case. It was nevertheless added that the domestic legal system has possibly a capacity for further development with regard to the tort of misfeasance in public office, under the influence of the jurisprudence of the Court.
[98] *Supra* 3.2.1.

suffice, when the loss complained of had been sustained through the adoption of a measure which involved the making of difficult policy choices on the part of the defendant despite its formally administrative nature.[99] The establishment of a sufficiently serious breach was not required, when the legislative act that constituted the basis of the relevant liability action had not been adopted in the exercise of wide discretionary powers.[100] However, this test was not adhered to strictly by the case law. As a result, the determining factor for the application of the one or the other set of conditions under this liability regime became often in practice the formal classification of the measure that allegedly gave rise to the loss as administrative or legislative. This led to the operation of the sufficiently serious breach criterion even with regard to measures that were probably normative only in form and not also in substance.[101]

Following the introduction of *Francovich*, it was suggested that the dynamic of the new doctrine would entail inevitably changes for the above described liability regime.[102] This position is certainly tenable. There is no plausible reason why individuals should be subjected under similar circumstances to a differentiated judicial treatment, depending on whether the source of their loss is the illegal activity of a political institution or a domestic authority. The greater margin of discretion often enjoyed by the defaulting institutions in the formulation of common policies and the difficult policy choices that have to be made by them in the performance of their legislative tasks can possibly explain why the perpetration of a sufficiently serious breach on their part may be more difficult to be established than

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[99] See especially Cases T-480 & 483/93, *Antillean Rice Mills and others v. Commission* [1995] ECR II-2305 and Case T-390/94, *Aloys Schröder v. Commission* [1997] ECR II-501. Their facts are set out in detail under 3.2.1. above, footnote No 24.

[100] Cases 44 to 51/77, *Union Malt v. Commission* [1978] ECR 57, Cases 279, 280, 285 & 286/84, *Rau v. Commission* [1987] ECR 1069, Case 27/85, *Vandemoortele v. Commission* [1987] ECR 1129, Case 265/85, *Van den Bergh en Jurgens v. Commission* [1987] ECR 1155 and Case 81/86, *De Boer Buizen v. Council and Commission* [1987] ECR 3677. Also see Cases T-481 & 484/93, *Vereniging van Exporteurs in Levende Varkens and another v. Commission (Live Pigs)* [1995] ECR II-2941. It was suggested there that the sufficiently serious breach requirement applies only with regard to measures, that are both legislative in nature and involve the making of difficult policy choices by the institution that adopted them.

[101] For example, Case C-152/88, *Sofrimport Sàrl v. Commission* [1990] ECR I-2477 and Case C-282/90, *Vreugdenhil v Commission (Vreugdenhil II)* [1992] ECR I-1937. The facts of these cases are set out under 3.2.2. above, at footnote No 27.

[102] Wathelet/Van Raepenbusch : 'La responsabilité des Etats Membres en cas de violation du droit communautaire. Vers un alignement de la responsabilité de l' Etat sur celle de la Communauté ou l'inverse ?', (1997) 33 *CDE* 13, pp. 42-43, Dubouis : 'La responsabilité de l'Etat législateur pour les dommages causés aux particuliers par la violation du droit communautaire et son incidence sur la responsabilité de la Communauté', (1996) 12 *RFDA* 583, pp. 593-594, Curtin : 'State Liability under EC Law: A New Remedy for Private Parties', (1992) 21 *ILJ* 74, p. 80, Fines : 'Quelle obligation de réparer pour la violation du droit communautaire ?', (1997) 33 *RTDE* 69, p. 86, Waelbroeck : *op cit.* No 43, pp. 482-483. Also see the similar suggestions of Advocates General Tesauro and Léger in *Brasserie/Factortame III* : *op cit.* No 4, point 96 and Case C-5/94, *The Queen v. Ministry of Agriculture, Fisheries and Food ex parte Hedley Lomas Ltd* [1996] ECR I-2553, at point 172.

with regard to breaches committed in the interpretation and implementation at national level of already adopted legislation. This does not nevertheless authorise the recognition of privileges, which are not justified on an objective basis. Realising thus that *Francovich* constitutes simply the other side of the principle of public liability under the Treaty, the case law borrowed from its pronouncements on the liability of the political institutions with regard to the conditions that govern the application of the doctrine. Until recently, it had not been attempted to reverse this process and to reconsider the solutions adopted with regard to the payment of damages by the defaulting institutions in the light of the developments that occurred in the field of governmental liability. It now seems that this has actually started taking place, following the relevant judicial pronouncements in *Bergaderm*.[103]

5.4.1. Bergaderm and its implications for the regime of Community liability : The case concerned a liability action for the payment of damages for loss allegedly sustained due to the adoption of Directive 95/34.[104] This measure restricted as potentially carcinogenic the use of a molecule contained in a sun oil produced by the plaintiff. It was alleged by the applicant that the act had been adopted in violation of certain procedural requirements, that its rights of defence had not been taken fully into account and that the defendant had committed a manifest error of assessment and a breach of the principle of proportionality. It was further sustained that the measure was in substance an administrative one and that it should thus suffice to show the existence of mere illegality, in order to receive compensation. The Court of First Instance disagreed with this classification.[105] It found that the contested measure was of a general application.[106] It added that liability could only arise, if the plaintiff managed to establish the existence of an infringement concerning a superior rule of law for the protection of the individual.[107] It concluded that it was not

[103] Case C-352/98 P, *Laboratoires Pharmaceutiques Bergaderm and Goupil v. Commission* [2000] ECR I-5291. This case and its implications for the regime of Community liability are analysed in detail by Tridimas : 'Liability for breach of Community law : Growing up and mellowing down ?', (2001) 38 *CMLRev* 301, at pp. 321 *et seq.*

[104] Eightieth Commission Directive 95/34/EC of 10 July 1995 adapting to technical progress Annexes II, III, VI and VII to Council Directive 76/768/EEC on the approximation of the laws of the Member States relating to cosmetic products (OJ 1995, L167/19).

[105] Case T-199/96 *Bergaderm and Goupil v. Commission* [1998] ECR II-2805.

[106] *Ibid.*, par. 50.

[107] *Ibid.*, par. 51.

necessary to proceed to such an examination, since the defendant had not committed any wrongful act in the adoption of the Directive.[108]

The case was then brought on appeal. The applicant submitted that the classification of the measure as legislative was incorrect. It further considered that it had wrongly been concluded that the defendant had not infringed a superior rule of law. The Court rejected the first plea, but what matters the most is the reasoning that it followed in order to do so. It started by clarifying that the regime of Community liability takes into account the complexity of the situations that need to be regulated, the difficulties encountered by the institutions in the interpretation and application of the law and the margin of the discretion enjoyed by the author of the contested act.[109] Interestingly enough, it went on to refer to *Brasserie/Factortame III* as the basic authority in this respect.[110] It then recalled the need to treat alike as a general rule the imposition of public liability, regardless of whether the perpetrator of the breach is a political institution or a domestic authority.[111] It concluded that the payment of damages for the illegal activity of the institutions is subjected to the same conditions that govern the application of *Francovich*, namely the existence of a sufficiently serious breach of a rule of law intended to protect individuals and the proof of a direct causal link between the violation complained of and the loss sustained by it.[112] In order for a sufficiently serious breach to exist, the defaulting institution or authority must have manifestly and gravely disregarded the limits on the exercise of its discretion.[113] When the violation has been committed in a field where the wrongdoer enjoyed considerably reduced or even no discretion at all, the mere infringement of the law may establish automatically a sufficiently serious breach.[114] The general or individual nature of the measure that constitutes the basis of the loss alleged by the applicant is not a decisive criterion for identifying the limits of the discretion enjoyed by the defendant.[115]

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[108] *Ibid.*, par 52 *et seq.*
[109] *Bergaderm* : *op cit.* No 103, par. 40. In this respect, also see the relevant statement of the Court in Cases C-363 & 364/88, *Finsider and others v. Commission* [1992] ECR I-359, par. 24 (the case was decided in the context of the ECSC Treaty).
[110] *Ibid.*
[111] *Ibid*, par. 41.
[112] *Ibid.*, par. 42.
[113] *Ibid.*, par. 43.
[114] *Ibid.*, par. 44.
[115] *Ibid.*, par. 46.

There are two major consequences that *Bergaderm* entails for the regime of Community liability.[116] In the first place, the dual set of conditions applicable so far is abandoned. It is replaced by a single set of rules, that operate regardless of the nature of the breach attributed to the wrongdoer. It is thus immaterial in this respect both the margin of the discretion possessed by the defendant and the legislative or administrative form of the allegedly illegal action. As a result, the sufficiently serious breach requirement becomes a necessary prerequisite for the receipt of compensation even with regard to individual measures and acts that are not characterised by the making of difficult policy choices in their adoption. The measure of the discretion enjoyed by the wrongdoer is no longer crucial for the determination of the conditions that the applicant has to satisfy, but it only comes into play when examining the gravity of the infringement attributed to the defendant. The greater the policy choices that had to be made by the latter, the more difficult it becomes to establish the existence of a sufficiently serious breach.

Of equal importance is the fact that *Bergaderm* seems to unify the conditions for the imposition of public liability on the political institutions and the domestic authorities. This takes place through the transposition of the *Francovich* requirements in the field of damages actions against the Community[117] and is well exemplified by the response given to the applicants with regard to their contention that the adoption of Directive 95/34 constituted a breach of a higher ranking rule of law. Referring back to the conditions for the establishment of liability as determined earlier in its judgment, the Court thought it necessary to rephrase the relevant ground of appeal as alleging the violation of a rule of law intended to confer rights on individuals.[118] There is no mention that the infringed legal standard must be superior. Furthermore, reference is now made to the intention of the violated norm to protect individual rights. This constitutes a linguistic variation of the requirement that the rule must be for the protection of the individual and has certainly been introduced to attain complete harmonisation with the *Francovich* test for liability.

[116] Also see Tridimas : *op cit.* No 103, pp. 325-330.
[117] *Bergaderm* : *op cit.* No 103, par. 41-44.
[118] *Ibid.*, par. 62.

An interesting question that arises in this respect is what *Bergaderm* entails in practice for the judicial protection of individuals and their chances of obtaining redress in liability actions against the defaulting institutions. At first sight, it seems that the receipt of compensation has become more difficult with regard to infringements of rules that do not entail legislative choices of economic policy. According to the traditional case law, the payment of damages in such circumstances was made subject to proof of mere illegality without the need to show the existence of a sufficiently serious breach. This is no longer the case following *Bergaderm*. It needs to be emphasised that the change brought on this point is kind of different from the one envisaged by the doctrine. The latter did not propose the transformation of the sufficiently serious breach test into a general condition for liability. It rather suggested the application of the restrictive liability regime only to acts that involved indeed the exercise of discretionary powers and the relaxation of the conditions under which it would be established that the defendant had manifestly and gravely disregarded the limits on the exercise of this discretion.[119]

It could be nevertheless sustained that proof of illegality under the previous regime presupposed the existence of some degree of culpability on the part of the wrongdoer.[120] Given that the sufficiently serious breach requirement has been interpreted under *Francovich* as referring to the violation of the duty of care expected by a normally diligent public authority, its extension to fields previously covered by the mere illegality rule should not affect in practice the chances of individuals to receive remedial protection against the defaulting institutions. It should also be taken into account that the lesser the degree of discretion enjoyed by the defendant in the perpetration of the violation alleged by the applicant, the easier it actually becomes to establish the existence of a sufficiently serious breach.[121] Its proof may even be automatic, when the wrongdoer has acted in a field where it was not called upon to make any difficult policy choices that could possibly provide some justification for the illegality of its activity.[122] In final analysis, *Bergaderm*

[119] For example, Dubouis : *op cit.* No 102, p. 594 and Wathelet/Van Raepenbusch : *op cit.* No 102, pp. 42-43. Also see the Opinion of Advocate General Léger in *Hedley Lomas* : *op cit.* No 102, at point 172 and Joliet : ***Le contentieux des Communautés Européennes***, Liège 1981, p. 270.
[120] *Supra* 3.2.1.
[121] *Bergaderm* : *op cit.* No 103, par. 40 and 43-44.
[122] *Ibid.*, par. 44.

does not make it more difficult for individuals to receive damages for unlawful administrative action. By linking the establishment of the sufficiently serious breach with the margin of the discretion enjoyed by the perpetrator of the breach, it attains the same result envisaged by the doctrine. It further dissociates the assessment of the choices that had to be made by the defendant from the formal classification of the contested act as administrative or legislative.

With regard to damage allegedly incurred through the adoption of legislative measures involving the making of difficult policy choices, the payment of compensation is no longer subjected to the requirements of the *Schöppenstedt* formula.[123] It is rather governed by the same conditions, that apply in the field of governmental liability. This means that the applicant does not have to prove any more that the infringed legal rule can be considered as superior. Notwithstanding this fact, it is doubtful whether this development carries with it any practical consequences. The establishment of illegality presupposes by definition that the activity of the defendant contravenes a legal standard, which is hierarchically superior to the act that constitutes the basis of the liability action. To require thus proof that the infringement concerns a higher ranking rule of law is nothing more than a tautology, that is in any case implicit in the concept of unlawfulness and which can be omitted without affecting the degree of the remedial protection available to individuals.[124]

Much more important in practice may prove the determination of the sufficiently serious nature of the breach in the light of the developments under the *Francovich* case law. In order to show that the defendant institution has manifestly and gravely disregarded the limits on the exercise of its powers, it will probably need to be established that the violation attributed to it is inexcusable with regard to the general circumstances under which it has actually taken place.[125] It is to be hoped that the gravity of the breach will be assessed exclusively on the basis of the conduct exhibited by the wrongdoer and that it will be dissociated completely from factors connected with the measure of the loss suffered by the plaintiff and the

[123] As developed in Case 5/71, *Aktien-Zuckerfabrik Schöppenstedt v. Council* [1971] ECR 975, par. 11. For more details, see 3.2.1. above.
[124] In the same direction, Tridimas : *op cit.* No 103, pp. 328-329.
[125] *Supra* 3.3.3.

number of the persons affected by a given violation.[126] It is encouraging in this respect that *Bergaderm* makes no reference to the special and abnormal damage requirements. If this implies that these criteria do no longer constitute part of the sufficiently serious breach test for the establishment of the liability of the defaulting institutions, this will certainly herald the improvement of the judicial protection of individuals with regard to damage inflicted through the adoption of legislative measures involving choices of economic policy.

5.4.2. The aftermath of Bergaderm : It will be recalled that *Bergaderm* was decided on appeal. A crucial issue that needs to be examined at this point has thus to do with the extent to which its general tenor has been followed by the subsequent cases, that have been dealt with at first instance. Some first indications in this respect have been provided for in *Fresh Marine Company.*[127] The applicant in that case was claiming compensation for the loss that it had suffered due to the imposition upon it of provisional anti-dumping duties.[128] It submitted that the decision to impose these provisional measures should actually be regarded as a bundle of administrative acts targeted only at itself. It thus suggested that it was not obliged to meet the strict liability rules, that applied with regard to legislative measures involving choices of economic policy.

When the case reached its judicial determination, it was reiterated that measures imposing anti-dumping duties are in principle considered as legislative acts requiring the satisfaction of the *Schöppenstedt* criteria.[129] Notwithstanding this fact, regard was paid to the particular features of the case at issue. The conclusion was then reached that the adoption of the specific measures had taken place in the context of an administrative operation, which concerned exclusively the applicant. That operation did not entail the making of difficult policy choices and conferred

[126] For more details on the extent to which the special and abnormal damage requirements have affected the satisfaction of the sufficiently serious breach test under the *Schöppenstedt* formula, see 3.3.1.1. above.
[127] Case T-178/98, *Fresh Marine Company AS v. Commission* [2000] ECR II-3331.
[128] On the basis of Regulation No 2529/97/EC of 16 December 1997 imposing provisional anti-dumping and countervailing duties on certain imports of farmed Atlantic salmon originating in Norway (OJ 1997, L346/63).
[129] *Fresh Marine Company* : *op cit.* No 127, par. 57. Reference was made in this respect to Case T-167/94, *Nölle v. Council and Commission* [1995] ECR II-2589 and Case C-122/86, *Metalleftikon Viomichanikon kai Naftiliakon and others v. Council and Commission* [1989] ECR 3959.

only little discretion on the defaulting institution.[130] As a result, the mere infringement of the law would suffice for the imposition of public liability on the defendant.[131] Reference in this respect was made to *Bergaderm*. It was thus concluded that the applicant needed to show that the defendant had committed an error of assessment, that would have actually been avoided in the same circumstances by an administrative authority exercising the ordinary measure of care and diligence.[132] On the facts of the case, the required normal duty of care had been indeed violated.[133] There was nevertheless found to be contributory negligence on the part of the plaintiff.[134]

The decision in *Fresh Marine Company* is rather puzzling. It begins by suggesting that the *Schöppenstedt* requirements are still applicable and that the sufficiently serious breach test has to be met only with regard to measures that involve legislative choices of economic policy. There is no explicit reference to the unification of the criteria for the payment of damages, regardless of the nature of the violation complained of by the applicant. It is certainly important that attention is paid to the substance of the contested measure and that the focus is on the margin of the discretion enjoyed by the defendant rather than on the formal classification of the allegedly illegal act. It is not nevertheless clarified whether this is made in order to assess whether the sufficiently serious breach requirement has been met on the facts of the case. Indeed, the intention might have been to determine whether the plaintiff was obliged to meet this condition in the first place. It is finally concluded that the mere infringement of the law suffices for the payment of damages with regard to measures that do not involve the exercise of wide discretionary powers. This is not entirely accurate. The experience from the field of governmental liability shows that the establishment of a sufficiently serious breach under such circumstances will only be automatic, when the infringement concerns an incapable of being misunderstood legal standard. In any other case, it will be necessary to make a detailed assessment of the clarity and precision of the law in the field where the unlawful activity has

[130] *Fresh Marine Company* : *ibid.*, par. 57-60.
[131] *Ibid.*, par. 61.
[132] *Ibid.*, par. 62.
[133] *Ibid.*, par. 73 *et seq.*
[134] *Ibid.*, par. 121 *et seq.*

taken place in order to determine whether the violation can be considered as inexcusable.[135] It is exactly this examination that led eventually to the conclusion that the normal duty of care required by the defendant had been indeed violated in the context of the *Fresh Marine Company* litigation. It is encouraging that the culpability of the defaulting institution was measured on the basis of the ordinary diligent authority test, monitoring in this respect the recent developments under the *Francovich* case law.

The general tenor of *Bergaderm* is reflected much better in three subsequent cases.[136] These involved applicants claiming damages allegedly inflicted due to the adoption of Regulation 2362/98, that introduced the new arrangements for banana imports.[137] The respective liability actions were brought on various grounds and were all dismissed on their merits. More relevant for our purposes are the judicial pronouncements made with regard to the claim that the contested measure violated certain provisions of the WTO Agreement. Citing *Bergaderm* as an authority, it was recalled that the right to reparation presupposes the perpetration of a sufficiently serious breach of a rule of law intended to confer rights on individuals.[138] Reference was then made to the standard case law, according to which the provisions of the WTO are not intended to confer such individual rights.[139] The actions were thus rejected, without examining the legality of the conduct of the defendant.[140]

What seems to arise from the above case law is that the *Francovich* requirements have effectively substituted the dual set of conditions, that governed until recently the imposition of liability on the political institutions. Under the new legal regime, the measure of the discretion enjoyed by the defendant in the perpetration of the violation alleged by the applicant ceases to be the determining factor for the application of the sufficiently serious breach test and turns into the principal criterion for the determination of the gravity of the infringement. The more

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[135] *Supra* 3.3.3.1(c).
[136] Case T-18/99, *Corbis Obst und Gemüse Groëhandel GmbH v. Commission* [2001] ECR II-913, Case T-30/99, *Bocchi Food Trade International GmbH v. Commission* [2001] ECR II-943 and Case T-52/99, *T. Port GmbH & Co. KG v. Commission* [2001] ECR II-981.
[137] Regulation No 2362/98/EC of 28 October 1998 laying down detailed rules for the implementation of Council Regulation No 404/93/EEC regarding imports of bananas into the Community (OJ 1998, L293/32).
[138] *Corbis* : *op cit.* No 136, par. 44, *Bocchi* : *op cit.* No 136, par. 50 and *Port* : *op cit.* No 136, par. 45.
[139] Case C-280/93, *Germany v. Council* [1994] ECR I-4973 (with regard to the pre-WTO regime) and Case C-149/96, *Portugal v. Council* [1999] ECR I-8395, par. 47.
[140] *Corbis* : *op cit.* No 136, par. 45, *Bocchi* : *op cit.* No 136, par. 51 and *Port* : *op cit.* No 136, par. 46.

discretionary the choices that the wrongdoer was called upon to make in the adoption of the act that constitutes the basis of the liability action, the more likely it becomes that the unlawful conduct attributed to it will be considered as excusable. This is because the existence of discretion carries with it the need to make difficult policy choices and assessments. This increases inevitably the possibility of adopting in good faith a legal act that transpires subsequently to be illegal, although its author has exhibited the normal duty of care expected by it under the circumstances. The basic question that still needs to be answered is how the sufficiently serious breach criterion will be determined in practice. The indications that exist so far are that attention will be paid to the conduct of the defendant and that recourse will be made to the clarity and precision factors and the test of the normally diligent public authority. The special and abnormal damage requirements will probably cease to constitute preconditions for the receipt of compensation. This will be nothing more than the logical completion of a process, that had already started taking place long before the decision in *Bergaderm*.[141]

[141] For more details on this point, see 3.3.1.1. above and especially the decisions in Cases C-104/89 & 37/90, *Mulder and others v. Council and Commission (Mulder II)* [1992] ECR I-3061 and Cases T-195 & 202/94, *Quiller and Heusmann v. Council and Commission* [1997] ECR II-2247.

Epilogue : A final appraisal of the current state of the law in the field of Francovich liability with a view to the future.

The introduction of *Francovich* constitutes the third ring in the judicial system progressively developed by the case law for the protection of the legal rights of individuals. The doctrine complements the previously explored principles of direct effect and consistent interpretation and heralds at the same time a shift of emphasis from the level of substantive rights to that of judicial remedies in the strict sense. It performs a dual function, aiming both at the reinstatement of the financial content of the infringed legal rights of the plaintiff and at the dissuasion of the public authorities from the violation of the respective obligations that the law imposes upon them. Its operation is possible with regard to any breach of legally binding rules of either the primary or the secondary legislation. It is based on the twin principles of effectiveness and effective judicial protection and requires the payment of reparation from the public funds, whenever this is necessary in order to ensure that the affected individuals will receive an effective form of redress in the context of a given scenario. Its establishment on judicially introduced principles rather than a concrete legal basis carries with it serious practical consequences. It makes it necessary in the first place to find the normative justification that authorises the payment of compensation from the public funds with regard to *Francovich* breaches. At the same time, it links the operation of the doctrine with the objectives pursued by the effectiveness requirements and allows the modification of the domestic arrangements on the matter only to the extent that this is indeed required for the provision to individuals of an effective measure of judicial protection.

6.1. Who can be sued under Francovich : With some reservation that still needs to be kept for infringements attributed to the judiciary, it is now established that *Francovich* liability can be imposed for the illegal activity of any of the three branches of government and for violations committed by bodies that have sufficiently close links with the central administration to be considered its public emanations. This entails innovative solutions for the majority of the national legal

orders, in which the payment of damages for legislative or judicial activity is either excluded completely as a matter of principle or is subjected to conditions that make the success of the relevant claims an almost impossible task. Indeed, a comparative analysis of the respective arrangements on public liability shows that it is only for breaches of an executive and administrative nature that the right of individuals to receive reparation is accepted without serious problems at national level. However, given that a point of departure for the imposition of some kind of governmental liability exists in the totality of the national legal orders, the principle of effectiveness requires the availability of a *Francovich* action even in circumstances where the provision of such a remedy would not have been possible for similar domestic law breaches. It suffices that this is the only way of ensuring that the plaintiff will receive an effective measure of protection on the facts of a given litigation. This is nothing more than a specific application of a case law that had already developed outside the field of damages actions and which progressively curtailed the discretion enjoyed by national law to determine the form of remedial protection that should be made available to individuals in any given scenario.

The normative justifications for this development with regard to legislative breaches can be traced in the modern form of the principle of public sovereignty and the supremacy mandates. The relevant discussion in the *Francovich* context is made on a completely different basis than the one justifying the recognition of public immunity for legislative activity under national law. Liability is imposed due to the violation of a hierarchically superior legal standard, the respect of which is required by the totality of the domestic authorities. The legislature is thus acting illegally, when it fails to give effect to the supremacy requirements. By doing so, it also contravenes the authorisation given to it by the citizens to ensure compliance with the voluntarily accepted by them system of rules contained in the Treaty and the provisions of the secondary legislation. It may not consequently rely on the alleged infallibility of the legislative activity and draw any argument from the principle of separation of powers in order to deny individuals the right to receive *Francovich* damages for any loss that its illegal conduct has given rise to. The same conclusions seem to hold true also with regard to breaches attributed to the constitutional

legislature. However, the national courts may prove very *reluctant in practice to* order the payment of compensation for constitutional violations. The matter continues to remain open for judicial resolution.

The indications from the case law seem to imply that *Francovich* liability can be imposed even for violations committed by the national judiciary. None of the arguments that are usually put forward to justify the immunity of the State in its judicial capacity is actually irrefutable. This is not to say that the extension of the doctrine in the field under consideration is entirely unproblematic. There are many obstacles that need to be overcome in this direction and the issue is heavily coloured by delicate political considerations. The question may not in fact arise in practice, since there is a way to circumvent it by considering that the breach complained of by the plaintiff is not actually judicial but rather administrative or legislative. This will be possible in the majority of the cases involving some kind of judicial irregularity.

6.2. The conditions for the operation of Francovich : With regard to the conditions for the application of the doctrine, the case law has introduced a distinction between substantive issues and matters of a procedural and remedial nature. Some of the former have been determined judicially and apply to the extent that there do not exist at national level more favourable liability standards for individuals. This is especially the case with regard to the measure of culpability that has to be established in order for the obligation to pay damages from the national treasury to exist. It is not any kind of illegality that can give rise to liability, but it must be exhibited that the wrongdoer has actually committed a sufficiently serious breach. This has been interpreted as meaning that its conduct has been gravely negligent and that it clearly does not reach the duty of care that would be expected in similar circumstances by a normally diligent public authority. In addition to that, the plaintiff must establish that the provision infringed intended to confer individual rights and that the loss sustained by him is causally linked with the illegal activity of the defendant.

All other issues have been left for determination to the domestic legal orders, subject to the respect of the effectiveness and equivalence provisos. The national

courts are thus obliged to have regard to the various pronouncements under the case law on what constitutes an effective and equivalent standard of protection and to apply the conclusions drawn therefrom in the *Francovich* area. They should also pay attention to the relevant judicial declarations in the field of Community liability, save to the extent that the transposition of the solutions adopted therein would violate the effectiveness requirements or fail to take account of the differences that exist in the functions performed by the political institutions and the domestic authorities. In any case, the reparation due under *Francovich* should be commensurate with the damage sustained. It must thus reinstate the plaintiff to the financial position that he would have been in, had it not been for the violation that constitutes the basis of the relevant liability action. Provided that this is so, it is for the domestic legal orders to determine the specific heads of damage for which compensation will be paid.

It is thus apparent that *Francovich* has introduced a partial harmonisation with regard to the conditions that govern its application. The case law has specified only the ones that are considered as absolutely essential for the homogeneous application of the doctrine. All other issues continue to be governed by the respective domestic arrangements, to the extent that they do not discriminate with regard to similar national law claims and do not undermine the chances of individuals to receive effective protection in the context of a given scenario. The same reliance on national law is made also as to the position that the doctrine holds in the system of remedies available in the courts for the judicial protection of individuals. As a result, the availability of a public liability suit is guaranteed only to the extent that the plaintiff does not have access at national level to other effective domestic remedies. It is further clear that national law may give effect to the *Francovich* requirements by offering to the affected individuals reparation in a form other than that of damages from the public treasury. It suffices that the loss sustained is made good in full. A similar indifference is shown also with regard to the determination of the appropriate defendant in liability claims brought under the doctrine. Provided that the effectiveness requirements are met, it does not matter the capacity in which the defendant will be sued and whether the action will be directed

against the central government or the specific authority responsible for the breach. The issue will be determined according to what national law provides on the matter.

The above described policy is in fact the only possible under *Francovich*, given the principles of effectiveness and effective judicial protection that the doctrine is based upon. Any intervention in the field under consideration is justified only to the extent that it is authorised by the need to guarantee that individuals will receive some form of effective redress in case of violation of the rights that the law intended to confer upon them. When national law already offers such a possibility, the respective domestic arrangements should remain intact from any judicial interference. This has the further consequence that the national standards of protection that exceed the minimum *Francovich* requirement should be extended to actions brought under the doctrine, even if this would lead inevitably to diversities in the judicial treatment offered to similar liability claims from the one legal order to the other. Indeed, the effectiveness requirements may not possibly justify the lowering down of the level of judicial protection offered at national level in order to reach the minimum standard of protection set by the case law. These are nothing more than concrete applications of the principle of national procedural autonomy that continues to govern the judicial enforcement of the legal rights of individuals and to determine the remedies that will be made available to them, subject to the respect of the effectiveness and equivalence requirements.

6.3. The practical effects of Francovich : The introduction of the doctrine contributes to the further reduction of the gap left in the system of protection of the legal rights of individuals, due to the absence of a legislative system capable of guaranteeing the respect of the law by the domestic authorities. The payment of damages is used in order to complement the protection already available to the plaintiff by virtue of alternative judicial remedies. It sometimes makes up for the complete absence of alternative forms of protection in the national courts. This is not to say that *Francovich* cures of itself all the problems connected with the enforcement of the law against the public authorities. Its operation will not be possible, when the breach affects exclusively the general interest without giving rise

to identifiable individual rights. Its dissuasive function is also very contestable with regard to infringements that give rise to small financial damage. The doctrine should not be nevertheless examined in isolation. It constitutes in fact the third component of a judicially developed enforcement and remedial system, also comprising the principles of direct effect and consistent interpretation. Its availability adds a further legal avenue to the judicial arsenal of individuals and any questions that it fails to give an answer to may be possibly addressed by making recourse to the alternative remedies that exist in the national courts. It should also be kept in mind that the protection that takes place at domestic law level is complemented by the operation of the public enforcement mechanism. The end result is that there exists nowadays a continuously expanding system for ensuring the respect of EU law by the domestic authorities. The payment of damages from the national treasury constitutes simply an aspect of the judicial and legislative mechanism established for this purpose.

At a different level, *Francovich* leads progressively to the harmonisation of the domestic arrangements on public liability. This takes place in two basic ways. With regard to claims covered by the protective scope of the doctrine, the national courts are required to set aside any domestic provision and principle that fails the effectiveness requirements as determined by the case law. This amounts to the creation of a relatively homogeneous body of public liability rules, that set the minimum standards that all national jurisdictions are obliged to comply with. A similar development may also occur with regard to cases that are based on purely domestic law grounds. This will not be nevertheless due to the operation of the principle of effectiveness, but rather to the possible spill-over effect of the *Francovich* jurisprudence and the practical difficulties that the national courts may encounter in the maintenance of two different sets of liability rules for claims that will usually require a uniform judicial treatment. Such a process has already taken place outside the field of damages actions and there are indications that it is now extended even with regard to public liability suits.

Quite apart from the effect that *Francovich* may entail for the domestic public liability systems, it now appears that it has led to the reconsideration of the solutions that applied so far for the payment of damages by the political institutions.

The unification of the liability standards that has taken place in this respect was in fact an expected development, given the similarities that obviously exist between the two closely related regimes of public liability. As the law stands at the moment, it seems that the payment of damages to individuals for the illegal activity of the domestic authorities and the political institutions is subjected to a single set of conditions, regardless of the type of breach alleged by the plaintiff. The required culpability standard is measured according to the normally diligent public authority test, by having regard primarily to the clarity and precision of the law in the field where the violation has occurred. Elements such as the gravity of the loss sustained by the applicant and the number of the persons affected by the infringement seem to be immaterial for the receipt of compensation under both legal regimes.

Table of Bibliography

A) Monographs

Alter, K.J., *Establishing the Supremacy of European Law* (Oxford University Press 2001)

Arnull, A., Dashwood, A., Ross, M. and Wyatt, D., *European Union Law* (London, Sweet & Maxwell 2000)

Barav, A. and Vandersanden, G., *Contentieux communautaire* (Bruxelles, Bruylant 1977)

Beseler, G., *Volksrecht und Juristenrecht* (1843)

Bobbio, N., *The Future of Democracy* (Cambridge, Polity Press 1987)

Bonnard, R., *De la responsabilité civile des personnes publiques et de leurs agents en Angleterre, aux Etats Unis et en Allemagne* (1914)

Brealey, M. and Hoskins, M., *Remedies in EC law : law and practice in the English and EC courts* (London, 2nd edition, Longman 1998)

Carré de Malberg, R., *Contribution à la théorie générale de l'Etat* I (Paris, Editions de CNRS 1962)

Carré de Malberg, R., *La loi, expression de la volonté générale* (Paris, Sirey 1931)

Cornils, *Der gemeinschaftsrechtliche Staatshaftungsanspruch* (Baden-Baden Nomos 1995)

Craig, P. and De Burca, G., *EU Law Text, Cases and Materials* (Oxford University Press, 2nd edition, 1998)

D'Sa, R.M., *European Community Law and Civil Remedies in England and Wales* (London, Sweet & Maxwell 1994)

Glanville, W. and Hepple B.A., *Foundation of the law of tort* (Butterworths 1984)

Haguenau, C., *L'application effective du droit communautaire en droit interne : analyse comparative des problèmes rencontrés en droit français, anglais et allemand* (Bruxelles, Bruylant 1995)

Hartley, T.C., *Constitutional Problems of the European Union* (Oxford-Portland Oregon, Hart Publishing 1999)

Hartley, T.C., *The Foundations of European Community Law* (Oxford University Press, 4th edition, 1998)

Jellinek, G., *Die Lehre von den Staatenverbindungen* (Berlin, Haering 1882)

Jellinek, G., *Gesetz und Verordnung : Staatsrechtliche Untersuchungen auf rechtgeschichtlicher und rechtsvergleichender Grundlage* (Freiburg, Mohr 1887)

Joliet, R., *Le droit institutionnel des Communautés européennes : le contentiex* (Liège, Faculté de Droit, d'Economie et de Sciences Sociales de Liège 1981)

Laferrière, E., *Traité de la juridiction administrative et des recours contentieux I* (2nd edition, Paris, Berger-Levrault 1896)

Lenaerts, K. and Arts, D., *Procedural Law of the European Union* (London, Sweet & Maxwell 1999)

Lenaerts, K. and Van Nuffel, P., *Constitutional Law of the European Union* (London, Sweet & Maxwell 1999)

Lewis, C., *Judicial Remedies and the Enforcement of European Community Law* (London, Sweet & Maxwell 1996)

Lock, J., *Two Treaties of Government* (1609)

Manitakis, A., *Κράτος Δικαίου* [*The State governed by the rule of law*] (Thessaloniki, Sakkoulas 1994)

Martin, E.A., *A Dictionary of Law* (Oxford University Press, 3rd edition, 1994)

Montesquieu, C., *De l'esprit des lois* (1748)

Pavlopoulos, P., *Η Αστική Ευθύνη του Δημοσίου I* [*The civil liability of the State* I] (Arthens-Komotini, Sakkoulas 1986)

Pavlopoulos, P., *Η Αστική Ευθύνη του Δημοσίου II* [*The Civil liability of the State* II] (Athens-Komotini, Sakkoulas 1989)

Prechal, S., *Directives in EC Law : A Study on EC Directives and their Enforcement by National Courts* (Oxford University Press 1995)

Stefanou, C. and Xanthaki, H., *A legal and political interpretation of Article 215 (2) (new Article 288 (2)) of the Treaty of Rome : the individual strikes back* (Aldershot, Dartmouth 2000)

Triantafyllopoulos, I., Αρχαίες Ελληνικές Έννομες Τάξεις [*Ancient Greek legal orders*] (1970)

Tridimas, T., *The General Principles of EC Law* (Oxford University Press 2000)

Troper, M., *La séparation des pouvoirs et l'histoire constitutionnelle française* (Paris, Librairie général de droit et de jurisprudence 1980)

Von Gierke, O.F., *Das deutsche Genossenschaftsrecht* (Akademische Druck-u Verlagsanstalt 1854)

Ward, A., *Judicial review and rights of private parties in EC law* (Oxford University Press 2000)

B) Collective Works

Andenas, M. and Jacobs, F. (eds.), *European community law in the English courts* (Oxford Clarendon Press 1988)

Beatson, J. and Tridimas, T. (eds.), *New Directions in European Public Law* (Oxford, Hart Publishing 1998)

Bell, J. and Bradley, A.W. (eds.), *Governmental liability : a comparative study* (United Kingdom National Committee of Comparative Law 1991)

Craig, P. and De Burca, G. (eds.), *The Evolution of EU Law* (Oxford University Press 1999)

Curtin, D. and Heukels, T. (eds.), *Institutional Dynamics of European Integration, Liber Amicorum for Henry Schermers* (Dordrecht/Boston, Nijhoff Publishers 1994)

Daintith, T. (ed.), *Implementing EC law in the United Kingdom : structures for indirect rule* (Chichester, Wiley 1995)

Heukels, T. and McDonnell, A. (eds.), *The Action for Damages in Community Law* (The Hague-Boston, Kluwer Law International 1997)

Jansen, R.H.M., Koster, D.A.C. and Van Zutphen, R.F.B. (eds.), *European Ambitions of the National Judiciary* (The Hague-London, Kluwer Law International 1997)

Kilpatrick, C., Novitz, T. and Skidmore, P. (eds.), *The Future of Remedies in Europe* (Oxford-Portland Oregon, Hart Publishing 2000)

Lonbay, J. and Biondi, A. (eds.), *Remedies for Breach of EC Law* (Chichester New York, Wylie 1997)

Perez Gonzalez, M. (ed.), *Hacia un nuevo orden internacional y europeo. Estudies en homenaje al Profesor Manuel Diez de Velasco* (Madrid, Tecnos 1993)

Schermers, H.G., Heukels, T. and Mead P. (eds.), *Non-Contractual Liability of the EC* (Dordrecht London, Martinus Nijhoff 1988)

Slaughter A-M., Sweet, A. and Weiler, J.H.H. (eds.), *The European Court and National Courts—Doctrine and Jurisprudence* (Oxford, Hart Publishing 1998)

Snyder, F. (ed.), *The Europeanisation of Law : The Legal Effects of European Integration* (Oxford-Portland Oregon, Hart Publishing 2000)

Vandersanden, G. and Dony, M. (eds.), *La Responsabilité des Etats Membres en cas de Violation du Droit Communautaire : études de droit communautaire et de droit national comparé* (Bruxelles, Bruylant 1997)

La Responsabilité des Pouvoirs Publics (Bruxelles, Bruylant 1991)

La révision du Traité sur l'Union européenne : perspectives et réalités (Paris, Pédone 1996)

Rapports de FIDE (Stockholm, 1998)

C) Articles

Abboud, W., 'EC Environmental Law and Member State Liability-Towards a Fourth Generation of Community Remedies' (1998) 7 *RECIEL* 85

Afilalo, A., 'How far Francovich ? Effective judicial protection and associational standing to litigate diffuse interests in the European Union' *Harvard Jean Monnet Working Paper* No 1/98

Alberton, G., 'Le régime de la responsabilité du fait des lois confronté au droit communautaire : de la contradiction à la conciliation ?' (1997) 13 *RFDA* 1017

Anagnostaras, G. 'State liability v. Retroactive application of belated implementing measures : Seeking the optimum means in terms of effectiveness of EC law' [2000] 1 *WebJCLI*

Anagnostaras, G., 'The allocation of responsibility in State liability actions for breach of Community law : A modern Gordian knot ?' [2001] 26 *ELRev* 139

Anagnostaras, G., 'The principle of State liability for judicial breaches : The impact of European Union law' (2001) 7 *EPL* 281

Anagnostopoulou, D., 'Do Francovich and the principle of proportionality weaken Simmenthal (II) and confirm abuse of rights?' (2001) 38 *CMLRev* 767

Anthony, G., 'Community Law and the Development of UK Administrative Law : Delimiting the 'Spill-Over' Effect' (1998) 4 *EPL* 253

Arnull, A. : 'Private applicants and the action for annulment since *Cordoniu*' (2001) 38 *CMLRev* 7

Arnull, A., 'What Shall We Do On Sunday ?' (1991) 16 *ELRev* 112

Barav, A., 'State liability in damages for breach of EC law in the national courts' (1996) 16 *YEL* 87

Bebr, G., (1992) 29 CMLRev 557

Bell, A., 'Enforcing Community law rights before national courts - Some developments' (1994) 21 *LIEI* 111

Bengtsson, B., 'Governmental liability for faulty judgments ?' (1994) 2 *ERPL* 113

Biondi, A., 'The Corte di Cassazione and the proper implementation of Community law' (1996) 21 *ELRev* 485

Biondi, A. and Johnson, L., 'The Right to Recovery of Charges Levied in Breach of Community Law : No Small Matter' (1998) 4 *EPL* 313

Birks, P., 'When money is paid in pursuance of a void authority' [1992] 37 *PL* 580

Bridge, J., 'Procedural Aspects of the Enforcement of European Community Law through the Legal Systems of the Member States' (1984) 9 *ELRev* 28

Cadiet, L., (1994) 2 *ERPL* 121

Cahiers, P., 'Les Articles 169 et 171 du Traité instituant la CEE à travers la pratique de la Commission et la jurisprudence de la Cour' (1974) 10 *CDE* 3

Caranta, R., 'Judicial protection against Member States : a new *jus commune* takes shape' (1995) 32 *CMLRev* 703

Caranta, R., 'Learning from our Neighbours : Public Law Remedies Homogenization from Bottom Up' (1997) 4 *MJ* 220

Chalmers, D., 'Judicial Preferences and the EC Legal Order' [1997] 60 *MLR* 164

Charrier, C., 'L'effectivité du droit à réparation conféré par le droit communautaire européen : élaboration d'une théorie générale de la responsabilité' (1997) 19 *RIE* 35

Chevallier, J., 'L' Etat de droit' (1988) 104 *RDpubl* 313

Christodoulou-Varotsi, I., 'La responsabilité de l'Etat Membre en cas de violation du droit communautaire et son application en Grèce' (1999) 52 *RHDI* 365

Convery, J., 'State Liability in the UK after Brasserie' (1997) 34 *CMLRev* 603

Coppel, J., 'Rights, Duties and the End of Marshall' [1994] 57 *MLR* 859

Couzinet, J-F., 'La faute dans le régime de la responsabilité non contractuelle des Communautés européennes' (1986) 22 *RTDE* 367

Craig, P., 'Direct Effect, Indirect effect and the Construction of National Legislation' (1997) 22 *ELRev* 519

Craig, P., 'Francovich, Remedies and the scope of damages liability' (1993) 109 *LQR* 595

Craig, P., 'Once more unto the breach : The Community, the State and damages liability' (1997) 113 *LQR* 67

Craig, P., 'Once Upon a Time in the West : Direct Effect and the Federalisation of EEC law' (1992) 12 *OJLS* 453.

Curtin, D., 'Directives : The effectiveness of judicial protection of individual rights' (1990) 27 *CMLRev* 709

Curtin, D., 'State Liability under EC Law : A New Remedy for Private Parties' [1992] 21 *ILJ* 74

Curtin, D., 'The Province of Government : Delimiting the Direct Effect of Directives in the Common Law Context' (1990) 15 *ELRev* 195

Cygan, A., 'Defining a sufficiently serious breach of Community law : the House of Lords casts its nets into the waters' (2000) 25 *ELRev* 452

Dantonel-Cor, N., 'La mise en jeu de la responsabilité de l'Etat français pour violation du droit communautaire' (1995) 31 *RTDE* 471

Dantonel-Cor, N., 'La violation de la norme communautaire et la responsabilité extracontractuelle de l'Etat' (1998) 34 *RTDE* 75

Deards, E., '*Brasserie du Pêcheur* : Snatching Defeat from the Jaws of Victory ?' (1997) 22 *ELRev* 620

Deards, E., '"Curiouser and Curiouser" ? The development of Member State liability in the ECJ' (1997) 3 *EPL* 117

Debbasch, R., 'Le juge administratif et l'injonction : La fin d'un tabou' (1996) *JCP* I 3934

De Burca, G., 'Proportionality and *Wednesbury* Unreasonableness : The influence of European concepts on UK Law' (1997) 3 *EPL* 561

De La Mare, T., 'The effective vindication of EC Consumer Rights ; direct effect and the alternatives' (1998) 8 *RAE* 217

De Witte, B., 'Community Law and National Constitutional Values' (1991) 18 *LIEI* 1

Dougan, M., 'The Francovich Right to Reparation : Reshaping the Contours of Community Remedial Competence' (2000) 6 *EPL* 103

Downes, T.A., 'Trawling for a Remedy : state liability under Community law' (1997) 17 *LS* 286

Dubois, L., 'La responsabilité de l' Etat législateur pour les dommages causés aux particuliers par la violation du droit communautaire et son incidence sur la responsabilité de la Communauté' (1996) 12 *RFDA* 583

Dubos, O., 'Le principe de la responsabilité de l'Etat pour violation du droit communautaire' (1997) 7 *RAE* 209

Durdan, A., 'Restitution or Damages : National Court or European Court ?' (1976) 1 *ELRev* 431

Dutheil de la Rochère, J., 'Le principe de responsabilité de l'Etat pour violation du droit communautaire : une garantie nouvelle pour les justiciables' (1996) *JCP* 476

Elbers, U. and Urban, N., 'The Order of the German Federal Constitutional Court of 7 June 2000 and the Kompetenz-Kompetenz in the European Judicial System' (2001) 7 *EPL* 21

Emiliou, N., 'State liability under Community law : Shedding more light on the Francovich principle ?' (1996) 21 *ELRev* 399

Emmert, F. and Pereira de Azevedo, M., 'Les jeux sont faits : rien ne va plus ou une nouvelle occasion perdue par la CJCE' (1995) 31 *RTDE* 11

Fernandez Esteban, M.L., 'National Judges and Community Law : The Paradox of the Two Paradigms of Law' (1997) 4 *MJ* 143

Fines, F., (1992) 108 *RDpubl* 1480

Fines, F., 'Quelle obligation de réparer pour la violation du droit communautaire ?' (1997) 33 *RTDE* 69

Fitzpatrick, B. and Szyszczak, E., 'Remedies and Effective Judicial Protection in EC Law' [1994] 57 *MLR* 434

Fuss, E.W., 'La responsabilité des Communautés européennes pour le comportement illégal de leurs organes' (1981) 17 *RTDE* 1

García de Enterría, E., 'Constitucionalización definitiva de las medidas cautelares contencioso-administrativas y ampliación de su campo de aplicación (medidas positivas), y "jirisdicción plenaria" de los Tribunales contencioso-administrativos, no limitada al efecto revisor de actos previos. Dos sentencias constitucionales' (1993) *REDA* 475

García de Enterría, E., 'The Extension of the Jurisdiction of National Administrative Courts by Community Law : the Judgment of the Court of Justice in Borelli and Article 5 of the EC Treaty' (1993) 13 *YEL* 19

Gasparon, P., 'The Transposition of the Principle of Member State Liability into the Context of External Relations' (1999) 10 *EJIL* 605

Goffin, L., 'A propos des principes régissant la responsabilité non contractuelle des Etats Membres en cas de violation du droit communautaire' (1997) 33 *CDE* 531

Gohin, O., 'La responsabilité de l'Etat en tant que législateur' (1998) 50 *RIDC* 595

Gravells, N., 'Part II of the Merchant Shipping Act 1988 : A sufficiently serious breach of European Community law ? [1998] 43 *PL* 8

Gravells, N., 'State liability in damages for breach of European Community Law' (1996) 41 *PL* 567

Graziadei M. and Mattei U., 'Judicial Responsibility in Italy : a New Statute' (1990) 38 *AJCL* 103

Green, N. and Barav, A., 'Damages in National Courts for Breach of EC Law' (1987) 7 *YEL* 55

Grossrieder Tissot, S., 'La responsabilité de la Communauté européenne du fait de l'activité normative de la Commission' (2001) 37 *RTDE* 91

Harding, C., 'The choice of court problem in cases of non-contractual liability under EEC law' (1979) 16 *CMLRev* 389

Harlow, C., 'Accidental Loss of an Asylum Seeker' [1994] 57 *MLR* 620

Harlow, C., 'Francovich and the Problem of the Disobedient State' (1996) 2 *ELJ* 199

Hartley, T.C., 'Concurrent Liability in EEC Law : A Critical Review of the Cases' (1977) 2 *ELRev* 249

Hecquard-Theron, M., 'La notion d'Etat en droit communautaire' (1990) 26 *RTDE* 693

Heers, M., 'La sécurité juridique en droit administratif français : vers une concécration du principe de confiance légitime' (1995) 11 *RFDA* 963

Herbots, J., 'La responsabilité délictuelle des personnes privées pour violation du droit communautaire' (1995) 114 *JT* 225

Hervey, T. and Rostant, H., 'After Francovich : State liability and British employment law' [1996] 25 *ILJ* 259

Hiljemark, L., 'Enforcement of EC Competition Law in National Courts - The Perspective of Judicial Protection' (1997) 17 *YEL* 82

Hilson, C., 'Liability of Member States in damages : The place of discretion' (1997) 46 *ICLQ* 941

Himsworth, C., 'Things Fall Apart : The Harmonisation of Community Judicial Protection Revisited' (1997) 22 *ELRev* 291

Hoffmeister, F., (2001) 38 *CMLRev* 791

Hoskins, M., 'Garden Cottage Revisited : The Availability of Damages in the National Courts for Breaches of the EEC Competition Rules' [1992] 13 *ECLR* 257

Hoskins, M., 'Tilting the Balance : Supremacy and National Procedural Rules' (1996) 21 *ELRev* 365

Iliopoulos-Strangas, J., 'La responsabilité de l'Etat en tant que législateur' (1998) 51 *RHDI* 310

Joliet, R., 'La protection juridictionnelle des particuliers contre les manquements étatiques' [first part] (1994) 10 *RFDA* 647

Joliet, R., 'La protection juridictionnelle des particuliers contre les manquements étatiques' [second part] (1994) 10 *RFDA* 865

Jones, M.L., 'The non-contractual liability of the EEC and the availability of an alternative remedy in the national courts' (1981) 8 *LIEI* 1

Jowell, J., 'Is Proportionality an Alien Concept ?' (1996) 2 *EPL* 401

Kakouris C., 'Do the Member States possess judicial procedural "autonomy" ?' (1997) 34 *CMLRev* 1389

Kinley, D., 'Direct Effect of Directives : Stuck on Vertical Hold' (1995) 1 *EPL* 79

Kortmann, S.C.J.J., 'Note à propos de l'arrêt de la Cour de Cassation en date du 19 Décembre 1991' (1994) 2 *ERPL* 115

Kvjatkovski, V., 'What is an "Emanation of the State" ? An Educated Guess' (1997) 3 *EPL* 329

Lackhoff, K. and Nyssens, H., 'Direct Effect of Directives in Triangular Situations' (1998) 23 *ELRev* 397

Lee, I., 'In Search of a Theory of State Liability in the European Union' *Harvard Jean Monnet Working Paper* No 9/99

Lengauer, A., (2000) 37 *CMLRev* 181

Lewis, C., 'L'influence du droit communautaire sur le droit administratif anglais' (1996) 52 *AJDA* numero spécial 124

Lewis, C. and Moore, S., 'Duties, Directives and Damages in European Community Law' [1993] 38 *PL* 151

Maganaris, E., 'The Principle of Supremacy of Community Law—The Greek Challenge' (1998) 23 *ELRev* 179

Maitland-Walker, J., 'A Step Closer to a Definitive Ruling on a Right in Damages for Breach of the EC Competition Rules' [1992] 13 *ECLR* 3

Malferrari, L., 'State Liability for Violation of EC Law in Italy : The reaction of the Corte di Cassazione to *Francovich* and Future Prospects in Light of its Decision of July 22, 1999, No 500' (1999) 59 *Zaörv* 809

Martin, C.P., 'Furthering the Effectiveness of EC Directives and the Judicial Protection of Individual Rights Thereunder' (1994) 43 *ICLQ* 26

Michoud, L., 'De la responsabilité de l'Etat' (1895) 2 *RDpubl* II 254

Mouameletzi, E., (1997) 17 *EEED* 130

Mouameletzi, E., Η ευθύνη του Κράτους για παραβίαση Κοινοτικού Δικαίου και το δικαίωμα των ιδιωτών σε αποζημίωση ['State liability for breach of EC law and the right of individuals to damages'] (1993) 13 *EEED* 371

Odman, N., (1998) 35 *CMLRev* 1395

Oliver, P., (1997) 34 *CMLRev* 635

Oliver, P., 'Interim measures : Some recent developments' (1992) 29 *CMLRev* 7

Olowofoyeku, A.A., 'State Liability for the Exercise of Judicial Power' [1998] 43 *PL* 444

Papakonstantinou, A., (1998) 24 *ToS* 977

Pâques, M., 'Trois Remèdes à l'inexécution du droit communautaire : utilité pour l'environnement ?' (1996) 73 *RDIDC* 135

Pardon, J. and Dalcq, R., 'La responsabilité des Etats Membres envers les particuliers en cas de manquements au droit communautaire' (1996) 115 *JT* 193

Pavlopoulos, P. and Alevizatos, N., 'Commentaire d'arrêt Cass.Belge, 19/12/91' (1994) 2 *ERPL* 136

Pescatore, P., 'Responsabilté des Etats Membres en cas de manquement aux règles communautaires' (1972) *Il Foro Padano* 10

Picardi, N., 'La responsabilité de l'Etat du fait de la fonction juridictionelle en droit belge' (1994) 2 *ERPL* 130

Prechal, S., 'Remedies after Marshall' (1990) 27 *CMLRev* 451

Rigaux, A., 'L'arrêt Brasserie du Pêcheur-Factortame III : Le roi peut mal faire en droit communautaire' (1996) 6 *Europe* 1

Ross, M., '*Beyond Francovich*' [1993] 56 *MLR* 55.

Ruffert, M., 'Rights and Remedies in EC Law : A Comparative View' (1997) 34 *CMLRev* 307

Schlemmer-Schulte, V.S. and Ukrow, J.U., 'Haftung des Staates gegenüber dem Marktbürger für gemeinschaftsrechtswidriges Verhalten' (1992) 27 *EuR* 82

Schmid, C., 'All Bark and No Bite : Notes on the Federal Constitutional Court's 'Banana Decision'' (2001) 7 *ELJ* 95

Schockweiler, F., 'La responsabilité de l'autorité nationale en cas de violation du droit communautaire' (1992) 28 *RTDE* 27

Schockweiler, F., Wivenes, G. and Godart, J.M., 'Le régime de la responsabilité extra-contractuelle du fait d'actes juridiques dans la Communauté Européenne' (1990) 26 *RTDE* 27

Siciliano, A., 'State Liability for Breaches of Community Law and its Application within the Italian Legal System' (1999) 5 *EPL* 405

Simon, D., 'Droit communautaire et responsabilité de la puissance publique, glissements progressifs ou révolution tranquille ?' (1993) 49 *AJDA* 235

Simon, D., 'Le Conseil d'Etat et les directives communautaires : du gallicanisme à l'orthodoxie ?' (1992) 28 *RTDE* 265

Slot, P. J., (1996) 33 *CMLRev* 1035

Smith, F. and Woods, L., 'Causation in Francovich : The neglected problem' (1997) 46 *ICLQ* 925

Smith, H., 'The Francovich case : State liability and the individual's right to damages' [1992] 13 *ECLR* 129

Snyder, F., 'The Effectiveness of European Community Law : Institutions. Processes, Tools and Techniques' [1993] 56 *MLR* 19

Somsen, H., (1996) 5 *EELR* 287

Steiner, J., 'From direct effects to Francovich : shifting means of enforcement of EC law' (1993) 18 *ELRev* 3

Steiner, J., 'The Limits of State Liability for Breach of European Community Law' (1998) 4 *EPL* 69

Stuyk, J., (1996) 33 *CMLRev* 1261

Stuyk, J., (2001) 38 *CMLRev* 719

Szyszczak, E., 'European Community Law : New Remedies, New Directions ?' [1992] 55 *MLR* 690

Szyszczak, E., 'Making Europe More Relevant To Its Citizens : Effective judicial Process' (1996) 21 *ELRev* 351

Tagaras, H., 'Le responsabilité étatique pour les dommages causés aux particuliers du fait de violations du droit communautaire' (1995) 48 *RHDI* 147

Tash, A.P., 'Remedies for European Community Law Claims in Member State Courts : Toward a European Standard' (1993) 31 *CJTL* 377

Tatham, A., 'Les recours contre les atteintes portées aux normes communautaires par les pouvoirs publics en Angleterre' (1993) 29 *CDE* 605

Temple Lang, J., 'Community Constitutional Law : Article 5 EEC Treaty' (1990) 27 *CMLRev* 645

Temple Lang, J., 'New legal effects resulting from the failure of States to fulfil obligations under EC law : The Francovich judgment' [1992-93] 16 *FILJ* 1

Temple Lang, J., 'The Duties of National Authorities Under Community Constitutional Law' (1998) 23 *ELRev* 109

Tesauro, G., 'Responsabilité des Etats Membres pour violation du droit Communautaire' (1996) 3 *RMUE* 15

Tesauro, G., 'The Effectiveness of Judicial Protection and Cooperation between the Court of Justice and the National Courts' (1993) 13 *YEL* 1

Tezcan, E., 'Le responsabilité des Etats-Membres vis-à-vis des particuliers pour violation du droit communautaire et sa mise en oeuvre par les juridictions nationales' (1996) 32 *RBDI* 517

Timmermans, C., 'Community Directives Revisited' (1997) 17 *YEL* 1

Toner, H., 'Thinking the Unthinkable ? State Liability for Judicial Acts after Factortame III' (1997) 17 *YEL* 165

Travers, N., 'The Liability of Local Authorities for Breaches of Community Directives by the Member States' (1997) 22 *ELRev* 173

Tridimas, T., 'Direct effect of directives : a missed opportunity ?' (1994) 19 *ELRev* 621

Tridimas, T., 'Liability for breach of Community law : Growing up and mellowing down ?' (2001) 38 *CMLRev* 301

Tridimas, T., 'Member State Liability in Damages' (1996) 55 *CLJ*

Van den Bergh, R. and Schäfer, H-B., 'State Liability for Infringement of the EC Treaty : Economic Arguments in Support of a Rule of "Obvious Negligence"' (1998) 23 *ELRev* 552

Van Gerven, W., 'Bridging the gap between Community and national laws : Towards a principle of homogeneity in the field of legal remedies ?' (1995) 32 *CMLRev* 679

Van Gerven, W., 'Bridging the unbridgeable : Community and national tort laws after Francovich and Brasserie' (1996) 45 *ICLQ* 507

Van Gerven, W., 'Non-contractual liability of Member States, Community Institutions and Individuals for Breaches of EC Law with a View to a Common Law for Europe' (1994) 1 *MJ* 6

Ward, A., 'New Frontiers in Private Enforcement of EC Directives' (1998) 23 *ELRev* 65

Wathelet, M. and Van Raepenbusch, S., 'La responsabilité des Etats Membres en cas de violation du droit communautaire. Vers un alignement de la responsabilité de l' Etat sur celle de la Communauté ou l'inverse ?' (1997) 33 *CDE* 13

Wills, W., 'Concurrent Liability of the Community and a Member State' (1992) 17 *ELRev* 191

Wooldridge, F. and D'Sa, R.M., 'ECJ decides Factortame (No 3) and Brasserie du Pêcheur' (1996) 7 *EBLR* 161

Wyatt, D., 'Damages against the State for Breach of EC Law' (1998) 9 *Lawyers' Europe* 6

Zampini, F., 'Responsabilité de l'Etat pour Violation du Droit Communautaire : L'Example de l' Italie' (1997) 13 *RFDA* 1039

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List of Abbreviations

AC—*Appeal Cases* (British Law Reports)

AJCL—*American Journal of Comparative Law* (American Law Journal)

AJDA—*L'actualité juridique - droit administratif* (French Law Journal)

All ER—*All England Reports* (British Law Reports)

CDE—*Cahiers de Droit Européenne* (Belgian Law Journal)

CFI—European Court of First Instance

CJTL—*Columbia Journal of Transnational Law*

CLJ—*Cambridge Law Journal* (English Law Journal)

CMLR—*Common Market Law Reports*

CMLRev—*Common Market Law Review*

EBLR—*European Business Law Review*

EC—European Community

ECHR—European Convention on Human Rights

ECtHR—European Court of Human Rights

ECJ—European Court of Justice

ECLR—*European Competition Law Review*

ECR—*European Court Reports*

ECSC—European Coal and Steel Community

ECSCT—European Coal and Steel Community Treaty

ECT—European Community Treaty

EDDD—*Epitheorisi Dimosiou kai Dioikitikou Dikaiou* (Greek Law Journal)

EEC—European Economic Community

EED—*Epitheorisi Emporikou Dikaiou* (Greek Law Journal)

EEED—*Eitheorisi Ellinikou kai Evropaikou Dikaiou* (Greek Law Journal)

EELR—*European Environmental Law Review*

EJIL—*European Journal of International Law*

ELJ—*European Law Journal*

ELRev—*European Law Review*

ERPL—*European Review of Private Law*

EPL—*European Public Law*

EU—European Union

EuLR—*European Law Reports*

EuR—*Europarecht* (German Law Journal)

Euratom—European Atomic Energy Community

EuZW—*Europäische Zeitschrift für Wirtschaftsrecht* (German Law Journal)

FIDE—Fédération Internationale de Droit Européen

FILJ—*Fordham International Law Journal* (American Law Journal)

Foro It—*Il Foro Italiano* (Italian Law Reports)

GATT—General Agreement on Tariffs and Trade

GURI—*Gazzetta Ufficiale della Republica Italiana*

HellDni—*Helliniki Dikaiosyni* (Greek Law Journal)

ICLQ—*International and Comparative Law Quarterly* (English Law Journal)

ICR—*Industrial Cases Reports* (English Law Reports)

ILJ—*Industrial Law Journal* (English Law Journal)

IRLR—*Industrial Relations Law Reports* (British Law Reports)

JCMS—*Journal of Common Market Studies*

JCP—*Jurisclasseur Périodique (Semaine Juridique)* (French Law Reports)

JO—*Journal Officiel des Communautés Européennes* (French Edition)

JT—*Journal des Tribunaux* (Belgian Law Journal)

JTDE—*Journal des Tribunaux - Droit Européen* (Belgian Law Journal)

KB—*Law Reports (King's Bench)* (English Law Reports)

LIEI—*Legal Issues of European Integration*

LQR—*Law Quarterly Review* (English Law Journal)

LS—*Legal Studies* (English Law Journal)

Mass.Giur.It.—*Massima di Giurisprudenza Italiana* (Italian Law Reports)

Mass.Giur.Lav—*Massima di Giurisprudenza del Lavoro* (Italian Law Reports)

MJ—*Maastricht Journal of European and Comparative Law*

MLR—*Modern Law Review* (English Law Journal)

NJW—*Neue Juristische Wochenschrift* (German Law Reports)

NoB—*Nomiko Vima* (Greek Law Journal)

OJ—*Official Journal of the European Communities* (English Edition)

OJLS—*Oxford Journal of Legal Studies* (English Law Journal)

OUP—Oxford University Press

Pas.Belg.—*Pasicrisie Belge* (Belgian Law Reports)

Pas.Lux—*Pasicrisie Luxembourgeoise* (Luxembourg Law Reports)

PL—*Public Law* (English Law Journal)

QB—*Law Reports (Queen's Bench)* (English Law Reports)

RAE—*Revue des Affaires Européennes-Law and European Affairs*

RARI—*Rivista Amministrativa della Republica Italiana* (Italian Law Journal)

RBDI—*Revue Belge de Droit Internationale* (Belgian Law Journal)

RDI—*Rivista di Dirittto Internazionale* (Italian Law Journal)

RDIDC—*Revue de Droit International et de Droit Comparé*

RDpubl—*Revue de Droit Public*

RECIEL—*Review of European Community and International Environmental Law*

Rec.Lebon—*Recueil des Décisions du Conseil d'Etat* (French Law Reports)

REDA—*Revista Española de Derecho Administrativo* (Spanish Law Journal)

RFDA—*Revue Française de Droit Administratif* (French Law Journal)

RHDI—*Revue Hellenique de Droit International* (Greek Law Journal)

RIDC—*Revue Internationale de Droit Comparé*

RIE—*Revue d'Integration Européenne*

RMC—*Revue du Marché Commun*

RMUE—*Revue de Marché Unique Européen*

RTDE—*Revue Trimestrielle de Droit Européen*

RUDH—*Revue Universelle des Droits de l'Homme*

TEU—Treaty on European Union

ToA—Treaty of Amsterdam

ToS—*To Syntagma* (Greek Law Journal)

UN—United Nations

VAT—Value Added Tax

WebJCLI—*Web Journal of Current Legal Issues* (Electronic Law Journal)

WLR—*Weekly Law Reports* (British Law Reports)

WTO—World Trade Organisation

YEL—*Oxford Yearbook of European Law*

Zaörv—*Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (German Law Journal)